

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

[2013] NZERA Christchurch 235
5429748

BETWEEN NARITHA PAENGKAM
 Applicant

AND G.L. FREEMAN HOLDINGS
 LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: John Bentley, Advocate for Applicant
 Alex Isherwood, Advocate for Respondent

Investigation Meeting: 12 November 2013 at Christchurch

Submissions received: 12 November 2013

Determination: 13 November 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Ms Paengkam claims arrears of wages in the sum of \$308.13 in relation to 21 hours 15 minutes that she worked between 22 and 28 July 2013 as a cleaner for the Redwood Hotel in Christchurch, owned by the respondent.

[2] The respondent states that Ms Paengkam is not entitled to be paid, relying on a clause in the employment agreement between the parties which the respondent claims entitles it to withhold wages when inadequate notice is given of resignation by the employee. In its statement in reply, the respondent stated that Ms Paengkam had abandoned her employment.

[3] Ms Paengkam gave her evidence partly in English and partly with the assistance of an interpreter of the Thai language.

Events leading to the dispute

[4] Ms Paengkam commenced working for the respondent as a cleaner on 22 July 2013 and worked 16 hours 15 minutes between Monday 22 and Thursday 25 July and a further 5 hours on Sunday 28 July. The respondent does not disagree that Ms Paengkam worked those hours. Ms Paengkam was paid at a rate of \$14.50 per hour and so claims the sum of \$308.13.

[5] Ms Paengkam gave evidence that, when she was working she found that the chemicals she was using to clean the toilets were making her hands blotchy and irritating her nose and eyes. She says that she asked a co-worker whether she could have gloves, but the co-worker told her that the hotel would not let her have them and that she had to provide her own. Ms Paengkam claimed that she did start to use her own gloves but that they became damaged.

[6] On Monday 29 July 2013 Ms Paengkam woke up and found that she had a painful knee, which she said had been caused by having to carry heavy bags of rubbish. She said that, because of her painful knee and because of the reaction she had been getting from the chemicals, she decided to resign. Ms Paengkam therefore telephoned reception that morning and asked them to pass a message on to the housekeeping department that she was leaving the employment of the company. Ms Paengkam said that she did not have another job to go to.

[7] Ms Paengkam said that she did not confirm the resignation in writing because she thought that giving oral notification of her resignation was sufficient. She also said that she did not give six weeks' notice as was required under the terms of the employment agreement she had signed. Ms Paengkam said in evidence that she could not have worked for a further six weeks if she had known that she was obliged to do so, because of the reaction she had been getting from the chemicals, which she said caused her to be scared that she might get cancer. In any event, Ms Paengkam said she was not aware that she had to give six weeks' notice because, although she had signed an individual employment agreement, she had not read it. Ms Paengkam said that she had been told by the company that it was *alright*.

[8] Evidence was given on behalf of the respondent by Ms Grenfell, payroll clerk. Ms Grenfell was unable to give evidence in relation to whether or not Ms Paengkam had suffered from an allergic reaction to the chemicals she was using, whether she had

suffered a bad knee from lifting heavy bags and whether or not the head of housekeeping had been aware of the telephone call that Ms Paengkam had made tendering her resignation. The head of housekeeping did not turn up at the investigation meeting.

[9] It is the respondent's case that it is entitled to withhold pay to Ms Paengkam because she failed to give six weeks' notice and also failed to confirm her resignation in writing.

The terms of the employment agreement

[10] The employment agreement signed by Ms Paengkam, which the respondent says is the same for every employee regardless of their status or position, contains the following clauses:

5.4 *Should the employee be indebted to the employer for wages forfeited due to lack of notice (clause 12.1) or for any other reason (including negligent transaction processing under clause 6.3) or the failure to return property belonging to the employer, the employee agrees that the appropriate sum may be deducted from the employee's wages and/or holiday pay or final pay.*

...

12. TERMINATION OF EMPLOYMENT AGREEMENT

12.1 *Employment may be terminated by either employer or employee upon six weeks notice of termination being given in writing. The employer may elect to pay six weeks wages in lieu of notice and in the event that the employee fails to give the required notice then equivalent wages shall be forfeited and deducted from any final pay including holiday pay.*

(a) *The employee must hand deliver their written resignation to the employer.*

...

14. ABANDONMENT OF EMPLOYMENT

If the employee is absent from work for a continuous period exceeding two working days without the consent of the employer or without notification to the employer the employee will be deemed to have terminated his/her employment.

Determination

[11] There are two issues that the Authority must consider in this matter, as follows:

- (a) Whether Ms Paengkam abandoned her employment;

- (b) Whether Ms Paengkam was forced to resign from her employment due to a fundamental breach by the employer in failing to protect Ms Paengkam from harm, caused by the chemicals she used in her work; and
- (c) Whether clauses 12.1 and 5.4 of the employment agreement are unlawful penalty provisions.

Did Ms Paengkam abandon her employment?

[12] I accept Ms Paengkam's evidence that she telephoned the receptionist at the respondent's hotel to communicate her decision to resign. Ms Grenfell was unable to confirm whether or not the receptionist received the call. As I accept that Ms Paengkam did call the respondent, she did not fail to notify the respondent of her absence, and so did not abandon her employment as defined in clause 14 of the employment agreement.

Was there a fundamental breach by the employer in failing to protect Ms Paengkam from harm which justified Ms Paengkam's resignation without notice?

[13] It is a well established principle of New Zealand law that an employer must *take all reasonable care not to cause employees physical or psychological injury or further injury by reason of the volume, character, nature or circumstances of the work required to be performed* (*Gilbert v. Attorney-General* [2000] 1 ERNZ 332 at p.57).

[14] The respondent gave no evidence with respect to the conditions under which Ms Paengkam worked, save that Ms Grenfell disagreed that Ms Paengkam had had to clean 40 toilets, as she had claimed. As the only detailed evidence I had before me about her working conditions was the evidence given by Ms Paengkam, I accept her evidence that the chemicals she worked with caused her not only an irritation to her skin, but also an irritation to her eyes and nose. I also accept the evidence of Ms Paengkam that having to carry heavy bags caused her a problem with her knee.

[15] On balance, therefore, I accept that the respondent failed in its duty to take all reasonable care not to cause Ms Paengkam physical injury by reason of the volume, character, nature or circumstances of the work they required her to perform. I am unable to ascertain with certainty the exact nature of the breach of duty, but conclude

that it is likely to have stemmed either from a lack of adequate training in the use of the chemicals and in manual handling, or a lack of the provision of adequate personal protective equipment to Ms Paengkam, or a failure to implement safe working procedures when handling hazardous chemicals and heavy loads, or a combination of these factors. In any event, if the respondent had taken reasonable care not to cause Ms Paengkam physical injury, it is not likely that Ms Paengkam would have suffered the reactions that she did so soon after having started work.

[16] In light of this, I believe that the company breached Ms Paengkam's contract of employment in a fundamental way and that that breach entitled Ms Paengkam to leave the employment of the respondent immediately, so as to protect herself from further harm. In legal terms, the company repudiated the contract of employment between itself and Ms Paengkam by failing to protect her from harm, and Ms Paengkam accepted that repudiation of the contract by resigning.

[17] As a result of that repudiation of the contract by the respondent, it was not entitled to rely on clause 12.1, requiring Ms Paengkam to give six weeks' notice; nor clause 12.1(a) requiring her to hand deliver a written resignation. Furthermore, as a consequence, it was not entitled to rely on clause 5.4 and to withhold pay otherwise due to Ms Paengkam.

[18] In summary, as a result of the company's repudiatory act in failing to protect Ms Paengkam from harm in the course of employment, the respondent can no longer rely on the terms of the employment agreement once Ms Paengkam accepted that repudiation by resigning. It follows from this that the respondent cannot rely upon those clauses to withhold pay from Ms Paengkam.

Are clauses 5.4 and 12.1 unlawful penalty provisions?

[19] Having concluded that the respondent was not entitled to rely upon clauses 12.1, 12.1(a) and 5.4 due to its repudiation of the contract of employment, it is not strictly necessary for me to go on to consider whether clause 5.4 and 12.1 are penalty provisions. However, I believe that it would be a useful exercise to undertake in light of the fact that all cleaners employed by the respondent are on the same terms of employment.

[20] The terms of the employment agreement between Ms Paengkam and the respondent have already been examined by the Authority in the matter of *Livingston*

v. GL Freeman Holdings Ltd [2013] NZERA Christchurch 90, in which Member Doyle found that the provision in clause 12.1 of an employment agreement between the respondent and a receptionist for the forfeiture of holiday pay and wages was not enforceable by being an unlawful penalty provision. It is understood that that determination is currently being challenged in the Employment Court on a *de novo* basis. It is further understood that the challenge is currently ready for scheduling but has not yet been set down.

[21] Although the clauses in question will be considered by the Employment Court in due course, the respective positions of Ms Livingston and Ms Paengkam are different in that Ms Livingston worked for the respondent as a receptionist whereas, of course, Ms Paengkam worked as a cleaner.

[22] The question of whether a sum stipulated in a contract to be paid or withheld is a penalty or a genuine attempt to estimate damages is to be decided with regard to the particular employment agreement, and at the time the agreement was entered into and not at the time of the alleged breach (*Dunlop Pneumatic Tyre Co Ltd v. New Garage & Motor Co Ltd* [1915] AC 79, HL). Therefore, it is not necessarily the case that, even if the Authority's decision in *Livingston* is overturned by the Employment Court, that the Employment Court's conclusions would be the same if it were to consider the same clause in respect of Ms Paengkam's situation. I therefore consider it appropriate to consider whether, in Ms Paengkam's employment agreement, clauses 5.4 and 12.1 are unlawful penalty provisions notwithstanding the challenge in *Livingston*.

[23] The general principle is that a contractual clause fixing damages to be paid in the event of a breach may be a genuine pre-estimate of the loss that would be caused to one party if the contract were breached by the other. If that is the case, the pre-estimate (otherwise known as liquidated damages) constitutes the amount that the aggrieved party is entitled to recover (or, in this case, withhold) in the event of a breach without being required to prove actual loss.

[24] On the other hand, if the contractual clause has the effect of being in the nature of a threat held over the head of the other party, as a security that the contract would be performed, the clause will be a penalty provision where the sum demanded (or withheld) is disproportionate to the actual injury. In such a case that is an unlawful penalty which is unenforceable, although the injured party can still prove the amount of his or her loss in the ordinary way.

[25] Ms Grenfell gave evidence that, when a cleaner leaves, it is generally easy to recruit a replacement. Ms Grenfell was not sure what happened when Ms Paengkam left, but she said that the company generally has advertisements running on TradeMe and applicants come forward and fill out application forms. She believed that it is generally the case that a cleaner can be found within a week or so.

[26] Assessing the reasonableness of clauses 5.4 and 12.1 at the time the agreement was entered into, it is my view that the respondent would have known that it was reasonably easy to find a replacement cleaner within the space of around a week and that the requirement that equivalent wages should be forfeited and deducted from any final pay, including holiday pay, if six weeks notice of termination were not given in writing, was not required or reasonable. I believe that the withholding of pay element of clause 12.1 does therefore act as a threat to prevent cleaners from giving less than six weeks' notice.

[27] Ms Paengkam was contractually entitled to be paid weekly and, therefore, the most that could be withheld pursuant to clauses 5.4 and 12.1 would be around one week's pay. In Ms Paengkam's case, dependent upon how many hours she might work in a week, this would probably vary between around \$300 and \$600 gross per week.

[28] In light of the fact that, by not working out her notice, the company would be saving her salary, I do not believe that the respondent would have incurred between \$300 and \$600 as a result of Ms Paengkam not giving six weeks' notice. However, one must add to this the fact that holiday pay is also capable of being withheld under the terms of the clauses in question. At 8% of gross salary, assuming Ms Paengkam would have left prior to accruing 12 months service, this would amount to between \$24.64 if she had worked for one week and around \$1,180 if she had worked just less than 12 months (and not taken paid holiday during the period of her employment). The total amount that could conceivably be withheld under the clauses 12.1 and 5.4 would therefore be in the region of \$1,480.

[29] It is my view that this sum would clearly significantly exceed the cost reasonably incurred by the respondent if a cleaner failed to give full notice and, therefore, I conclude that in terms of the agreement between the company and Ms Paengkam, clauses 5.4 and 12.1 constitute unlawful penalty provisions.

Orders

[30] I have found that the respondent was not entitled to withhold Ms Paengkam's wages and I therefore order the respondent to pay to Ms Paengkam the gross sum of \$308.13 in terms of unpaid wages and a further gross sum of \$24.64 in terms of unpaid holiday pay.

[31] I further order that the respondent pay to Ms Paengkam, under clause 11(1) of Schedule 2 of the Employment Relations Act 2000, interest payable on the gross sum of \$332.77 at the rate of 5% per annum being the rate prescribed under s.87(3) of the Judicature Act 1908, to run from Monday 5 August 2013 (when payment to Ms Paengkam would have reasonably been expected to have been made) until such date when the whole of the sum of \$332.77 pursuant to this determination has been paid.

[32] I further order the respondent to reimburse to Ms Paengkam's her costs in bringing her application to the Authority in the sum of \$71.56, being the application fee paid by her to the Authority.

David Appleton

Member of the Employment Relations Authority