

[4] The employment ended in September 2009, although the precise date is unclear. Mr Pakinga, through his advocate Ms Corin, in a letter to the employer stated that he had finished on 22 September 2009. Mr Tomsett, on behalf of the employer, recalls that it was nearer the end of September when Mr Pakinga resigned.

[5] Mr Pakinga does not claim he was dismissed from his employment. He was not under a fixed term agreement and there is no suggestion of termination by mutual consent. I conclude that the employment ended by resignation.

[6] At the time Mr Pakinga finished he was unfit to perform, or fully perform, his work. An ACC medical certificate issued on 21 September 2009 stated that he was unable to resume any duties from that date for 45 days. A second medical certificate, issued on 12 October 2009, stated that he was unable to continue in his current form of employment because of his health problems.

[7] Mr Tomsett produced a schedule of annual holidays he said Mr Pakinga had taken during his employment. He worked out an amount owed to Mr Pakinga at the termination of his employment for untaken leave. From this Mr Tomsett deducted \$349, being the cost paid by the company for private telephone calls made by Mr Pakinga on the firm's cellphone issued to him for work purposes. Mr Tomsett has copies of telephone accounts showing that the calls were usually made to Mr Pakinga's partner or daughter and were therefore personal. After that deduction Mr Tomsett deducted from the balance a further two weeks' pay. He claimed Mr Pakinga was required to forfeit that amount in lieu of giving notice of his termination, as required of him under the employment agreement.

[8] Mr Pakinga disputed the assessment of annual leave taken by him. He said the schedule showed one or more weeks in which he had been working and not on leave. Mr Tomsett confirmed the method the company had used for recording leave, which was a fairly simple one.

[9] A second aspect of dispute with the company's calculations is the insistence that Mr Pakinga pay for his private telephone calls. He claimed that this had never been identified to him as a requirement.

[10] Mr Pakinga also disputed that the employer could invoke the express provision requiring him to give two weeks' notice of termination or forfeit two weeks' pay in lieu of that. It was argued that as Mr Pakinga was not working at the time and that the

employer knew this, there could not have been any expectation of him being able to work out a notice period of any length.

Determination

[11] I accept the assessment of Coromandel Peninsular Couriers as to the annual leave taken by Mr Pakinga during his employment. Detailed business records were kept and produced to the Authority to verify those occasions. By contrast, all Mr Pakinga could produce was the expression of his disagreement that he had taken leave on those dates. He offered no means of showing that he was actually working during the periods in question. I reject the suggestion that the leave records were changed by Mr Tomsett. I accept them as an accurate account properly kept for the purposes of recording annual leave.

[12] I accept that the employer was entitled to require Mr Pakinga to pay for his private use of the company's cellphone. There was no provision in the employment agreement allowing him that benefit.

[13] Further, I find that an express provision of the employment agreement authorised the employer to deduct from Mr Pakinga's pay whatever moneys the employer was owed under the employment relationship or otherwise. There was, therefore, a signed written agreement allowing the deduction, as permitted by s 5 of the Wages Protection Act 1983.

[14] Finally, I find that Mr Pakinga was not excused in the circumstances from giving notice if he wished to terminate his employment by resignation. His injury or ill health had not terminated the employment, even if that was a possible or even likely future consequence of his medical condition. Clause 8.1 is quite clear that a minimum of two weeks' notice in writing is required from either party to the other, to terminate the agreement. It also provides that "the employee's failure to provide and work out completely such adequate notice may result in the forfeiture of wages, holiday pay etc in lieu." There was no discussion as to the possibility that Mr Pakinga could work out the notice period on light duties. Mr Tomsett considered he was able to drive the courier vehicle but could not do other work such as sweeping between shifts.

[15] I therefore accept that the employer made a correct assessment of the amounts due to Mr Pakinga at termination. Because of deductions that were permitted, there

was no balance left unpaid to Mr Pakinga and his claim to recover holiday pay must fail.

[16] For completeness, I note that in the statement of problem a remedy claimed was compensation for hurt and humiliation and loss of benefit from the non-payment of holiday pay. The application to the Authority made in Form 1 did not expressly refer to any personal grievance claim but Ms Corin, writing on behalf of Mr Pakinga to the employer, had headed her letter “summary of personal grievance.” It began:

This letter is notification of a Personal Grievance for Non Payment of Holiday pay owed to Mack when he worked for Coromandel Couriers.

[17] The letter also states that Mr Pakinga did not terminate his employment, suggesting perhaps that he was dismissed.

[18] I find that if it was intended to raise a personal grievance, whether in relation to his termination or the non-payment of holiday pay, which is usually addressed with a recovery action and not compensation, the grievance was raised on 5 August 2010, whereas the employment had ended in about September 2009. Clearly from the material supplied to the Authority by both parties, any grievance was raised long outside of the 90 day period required under the Employment Relations Act 2000. I do not consider there is any issue arising from this to be determined by the Authority.

[19] I therefore determine this employment relationship problem in favour of Coromandel Peninsular Couriers Limited. In the result no orders are required to be made.

A Dumbleton
Member of the Employment Relations Authority