

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 98  
5434825

BETWEEN

JON QUENTYN SEAMAN  
Applicant

A N D

SIMPLY SECURITY LIMITED  
Respondent

Member of Authority: T G Tetitaha  
Representatives: Applicant in person  
Respondent in person  
Investigation Meeting: 14 March 2014  
Date of Determination: 14 March 2014

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**ORAL DETERMINATION OF THE AUTHORITY**

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**Orders**

- A. There is an order Simply Security Limited pay Jon Seaman \$273.00 being the first aid training fees wrongly deducted pursuant to s.131 Employment Relations Act 2000. Payment is to be made within 7 days of the date of this determination.**
- B. The personal grievance arising from unjustifiable disadvantage is dismissed.**
- C. The application for penalty is dismissed.**
- D. The counterclaim is dismissed.**
- E. Costs are to lie where they fall.**

**Employment relationship problem**

[1] Jon Seaman was employed as a security guard by Simply Security Limited (SSL) in April 2011. He signed a casual employment agreement on 14 April 2011.

[2] Between April to August 2011 Mr Seaman worked 40 hours per week. In August 2011 SSL offered him a permanent position. An employment agreement dated 15 August 2011 signed by its authorised agent was received by Mr Seaman. He disagreed with the terms of the agreement and did not sign it. He did not speak to SSL about his concerns.

[3] During this period Mr Seaman received a pay increase from \$13.50 per hour to \$14 per hour.

[4] On 12 August 2013 Mr Seaman gave written notice. He believed he was able to give one week's notice of termination as provided in his casual employment agreement.

[5] SSL disagreed. It believed the employment agreement he was offered on 15 August 2011 applied. In accordance with that agreement he was required to give four weeks' notice of termination. It also sought to reclaim a payment for his attendance at a first aid course.

[6] Mr Seaman worked out his one week's notice. On or about 17 September 2013 Mr Seaman received his final payslip showing deductions of \$3,650.42 from his final pay. The deductions encompassed three weeks' notice and the costs of a first aid training course.

[7] Mr Seaman raised a personal grievance seeking payment of the deductions. He sent an email accepting the deduction of the first aid training fees.

[8] On or about December 2013 following legal advice, SSL made a payment of his net wages of \$2,016 to Mr Seaman without prejudice to its rights to defend its claims before the Authority. Accordingly, the only amount outstanding to Mr Seaman is \$273 for the first aid training course. Mr Seaman also seeks compensation for hurt and humiliation and a penalty for breaching a term of his agreement.

**Issues**

[9] The following issues arise:

- (a) Was SSL legally entitled to make the deductions?
- (b) Was Mr Seaman unjustifiably disadvantaged by this behaviour? If so, what remedies should flow?
- (c) Should a penalty be awarded?
- (d) Should the deductions be off-set by way of counterclaim for notice and training costs?

***Was SSL legally entitled to make the deductions?***

[10] The Wages Protection Act 1983 prohibits any deductions from employee wages that have not been requested or authorised in writing, whether the deductions appear justifiable or not (s.5). There is no evidence of written consent from Mr Seaman to the deductions.

[11] There must be offer and acceptance for an employment agreement to be binding upon parties. It is common ground that SSL made an offer of employment on varied terms to Mr Seaman. There is no evidence of his acceptance. Silence does not necessarily mean consent. Mr Seaman was not offered better pay or terms under the new employment agreement in exchange for his acceptance. He received the same pay, but with more onerous clauses.<sup>1</sup>

[12] Mr Seaman was already a permanent employee. He was working full time hours from April to August 2011. His employment status changed from casual to a permanent employee when he was offered and accepted regular full time hours. His evidence was he had asked for and worked full time hours from the beginning of his employment.

[13] A unilateral subjective intention cannot create an employment relationship for the purposes of the Act.<sup>2</sup> The fact SSL sought to impose an agreement upon Mr Seaman did not set aside his previous casual employment agreement. Mr Seaman's employment status may have changed, but his terms and conditions of employment

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<sup>1</sup> Employment agreement 15 August 2011 right to make deductions (clause 4.6); requirement to reimburse for training (clause 6); restricted public holidays (4) (clause 7.3); more stringent confidentiality provisions (clause 18); restriction on secondary employment (clause 20.4); full indemnity (clause 21); agreement to use of surveillance equipment (clause 25); random drug testing (clause 26); non-solicitation (clause 28); restraint of trade (clause 29); further trial period (clause 5); extended notice period (1 week to 4 weeks) and non-competition clause (Schedule 3 clause 6 & 9)

<sup>2</sup> *Tucker Wool Processors Ltd v Harrison* [1999] 1 ERNZ 894 (CA) at paragraph [39]

insofar as they are consistent with his permanent employment status did not. This was confirmed by clause 15 of his casual employment agreement. It provides the casual employment agreement *may only be amended or varied by written consent signed by both parties*. The employment agreement dated 8 August 2011 was never signed and cannot operate as a variation to his existing terms and conditions. SSL cannot rely upon the later agreement to make the deductions for notice or training costs.

[14] Mr Seaman sent the email consenting to the deduction for the first aid training costs because he believed SSL were allowed to make the deduction by the Employment Relations Act 2000. He would not have sent the email otherwise.

[15] There is no legal requirement under the Employment Relations Act for allowing deductions from an employee's wages for training costs. This is a matter under the Wage Protection Act 1983. His email cannot operate as a request or written authorisation under s5 of that Act in the circumstances.

[16] There is an order Simply Security Limited pay Jon Seaman \$273.00 being the first aid training fees wrongly deducted pursuant to s.131 Employment Relations Act 2000. Payment is to be made within 7 days of the date of this determination.

***Was Mr Seaman unjustifiably disadvantaged by this behaviour? If so, what remedies should flow?***

[17] Mr Seaman claims he was unjustifiably disadvantaged because a condition of his employment was affected to his disadvantage by unjustifiable action of SSL. The condition of his employment breached was for SSL to pay his wages within a reasonable time.

[18] Clause 9 of his casual employment agreement provides:

*9.5 Because of the irregular nature of casual work it is possible that payment or work performed during one weekly pay period will not be received until the following pay period has been completed. For these reasons we recommend the employee adjust any financial commitments accordingly.*

[19] The effect of that clause was Mr Seaman could not expect to be paid on a week to week basis. There may be delay and he needed to adjust his financial commitments accordingly. He may have been deprived of the immediate use of his money, but this was to be expected under his agreement.

[20] Mr Seaman was initially paid three weeks later than anticipated in September 2013 less the deductions for notice and the first aid training course. The majority of the deductions were paid to him in December 2013.

[21] There was no evidence SSL intended to deliberately breach any condition of his employment. There was a lack of clarity around the legal arrangements between these parties. SSL believed it was operating under the new employment agreement at the time it made the deductions. This belief was based on advice they found on the MBIE website. The MBIE website does contain reference to silence indicating acceptance of an agreement.<sup>3</sup> When Mr Seaman disagreed with their view, they sought legal advice. Their legal advice was this is a grey area, so they opted to make the payment less the training costs. Mr Seaman had consented to SSL deducting the training expenses, but not the unworked notice period.

[22] Both parties held an honest and reasonable belief there was an entitlement to make deductions at the time they were made. In the circumstances, there was insufficient evidence on the balance of probabilities to show Mr Seaman was unjustifiably disadvantaged or that SSL was acting without justification.

[23] Accordingly, the personal grievance arising from unjustifiable disadvantage is dismissed.

***Should a penalty be awarded?***

[24] Mr Seaman seeks a penalty for the action even if his unjustifiable disadvantage claim fails. The penalty must arise under s.4A for a breach of good faith by this action. There is no evidence of the requirements of s.4A(a) or (b) that the failure was *deliberate, serious and sustained* or *was intended to undermine an individual employment agreement*.

[25] Accordingly, the application for penalty is dismissed.

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<sup>3</sup> <http://www.dol.govt.nz/workplace/knowledgebase/item/1336> extract states “If an employee does not sign their employment agreement, and says or does nothing specifically to indicate they do not agree to it, their employer may take their silence and other conduct by the employee as indicating acceptance of the employment agreement.”

*Should the deductions be off-set by way of counterclaim for notice and training costs?*

[26] SSL still seeks to reclaim the amounts paid to Mr Seaman on the basis of a counterclaim. Its counterclaim alleges it incurred losses due to the lack of notice. It submits reasonable notice in these circumstances should be four weeks not one week.

[27] The casual employment agreement provides for notice of termination by either party of one week given either verbally or in writing.<sup>4</sup> This must define reasonable notice unless the parties agree otherwise.

[28] The Authority is not persuaded the alleged losses would not have been incurred anyway because of the demands of this particular client. The client sought an additional guard to be trained. SSL had sufficient staff to cover Mr Seaman's loss immediately but this client was not satisfied with the proposed replacement. SSL were also in contract negotiations with the client. This client may have demanded more than what it would normally in these circumstances.

[29] The Authority is not persuaded Mr Seaman's lack of notice was causative of these losses in the circumstances. Accordingly, the counterclaim is dismissed.

[30] Both parties were self-represented. Costs are to lie where they fall.

**T G Tetitaha**  
**Member of the Employment Relations Authority**

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<sup>4</sup> Casual Employment Agreement dated 14 April 2011 clause 6.2 and schedule 3, clause 4