

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 344/08  
5111482

BETWEEN                      WENDY SHEREE  
   THOMPSON  
   Applicant

AND                              CLAIRE WADE  
   Respondent

Member of Authority:      Vicki Campbell

Representatives:           Applicant in Person  
   Respondent in Person

Investigation Meeting:    15 September 2008 at Whakatane

Determination:             30 September 2008

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**DETERMINATION OF THE AUTHORITY**

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[1]      Ms Sheree Thompson was employed by Ms Claire Wade as a Beautician/Nail Technician in Ms Wade's business known as Body and Soul, on 22 February 2007. She remained in her employment without incident until Friday 31 August 2007.

[2]      On 27 August 2007 Ms Thompson resigned from her employment giving four weeks notice. She says that on 31 August 2007 Ms Wade told her not to work her notice period out and that she could leave that day. Ms Thompson seeks payment of four weeks pay in lieu of her working her notice out, which she has not received. Ms Thompson also seeks payment of her holiday pay from 1 April to 31 August at the rate of 2% as she was only paid on the basis of 6% for that period and not 8% as required by the Holidays Act 2003.

[3]      When Ms Thompson's final pay was calculated Ms Wade deducted \$85.00 for treatments received by Ms Thompson during her employment. Ms Thompson

seeks reimbursement of this amount as she says she should not have had to pay for the two treatments concerned. Finally, Ms Thompson is claiming \$700 for a nail drill which she used in her employment and which was damaged.

The issues for determination are:

- Should Ms Thompson have been paid out for the four weeks notice she didn't work?
- What holiday pay is outstanding?
- Was Ms Wade able to make the deductions for the treatments?
- Should Ms Wade be required to pay for the damaged nail drill?

**Should Ms Thompson have been paid out for the four weeks notice she didn't work?**

[4] The terms of Ms Thompson's employment were set out in a written employment agreement. With regard to the ending of the employment relationship the employment agreement provides for not less than four weeks notice in writing. The agreement also allows the employer to pay wages in lieu of the employee having to work out the notice period.

[5] On 27 August 2007, while she was on sick leave, Ms Thompson texted Ms Wade and told her she was unhappy working at Body and Soul and provided the requisite four weeks notice. Ms Wade texted back requesting Ms Thompson to put her notice in writing for her. Ms Thompson says she did put her notice in writing, brought the letter into work, and left the letter on the counter for Ms Wade. Ms Wade says she never received the written confirmation of Ms Thompson's notice.

[6] Ms Thompson remained on sick leave until she returned to work on 31 August 2007. The day before she was due to return to work, Ms Wade texted Ms Thompson and advised her she had attempted to contact her and advised Ms Thompson that she was happy if Ms Thompson wanted to terminate her employment without notice. That evening Ms Thompson texted back and asked Ms Wade if Ms Wade had decided whether she needed to work out her notice and asked her to let her know by 6.00am the following morning.

[7] Ms Wade, in response requested Ms Thompson to come into work the following morning to discuss it.

[8] On Friday 31 August Ms Thompson says she went into work ready to work. On her arrival Ms Wade asked her to go into her room where they discussed Ms Thompson's resignation.

[9] Ms Thomspson says Ms Wade told her she didn't need to work the four weeks notice. However, Ms Thompson's new job, which was in competition to Ms Wade's business, wasn't due to commence until the end of the four week notice period which means Ms Thompson would not receive any pay for that period. For that reason Ms Thompson wanted to work her notice period out.

[10] Ms Thompson says Ms Wade told her she didn't want her there and after a heated exchange Ms Thompson says Ms Wade swore at her and told her in no uncertain terms, to get her stuff and leave the workplace.

[11] Ms Wade says that the meeting did not happen in her room, but that she went into Ms Thompson's room. Ms Wade says she was quite hurt that Ms Thompson was feeling unhappy. Ms Wade says she was interested to know if Ms Thompson had an alternative job to go to and to understand why she wanted to work out her notice period. Ms Wade acknowledges that she told Ms Thompson that she had a lack of trust in her and that she wanted Ms Thomspson working out front. There is a dispute as to whether Ms Wade told Ms Thompson that if she insisted on working out her notice period then she would have no customer contact and would be cleaning for the next four weeks.

[12] I find, on the balance of probabilities that it is more likely than not, that Ms Wade did not want Ms Thompson to work out her notice period given that Ms Thompson was leaving to work for a competitor. Also, Ms Wade told me she had concerns over comments Ms Thompson had allegedly made in the past, to clients and that that left the business vulnerable if Ms Thompson worked out her notice.

[13] I am satisfied Ms Wade did not require Ms Thompson to work out her notice period. In accordance with the employment agreement between the parties, Ms Thompson should have been paid four weeks notice in lieu of the requirement for her to work out the notice period.

**Ms Claire Wade is ordered to pay to Ms Thompson four weeks wages in lieu of notice being \$2,096.56 gross (calculated as the average earnings for the last four weeks of Ms Thompson's employment) within 28 days of the date of this determination.**

**What holiday pay is outstanding?**

[14] Ms Wade calculated Ms Thompson's holiday pay on the basis of 6% of her gross earnings. From 1 April 2007 the calculation of holiday pay should have been made at the rate of 8%. Ms Thompson took one week's paid holiday in May 2007 and another paid day's holiday in July 2007. These holidays were in advance of her entitlement to annual leave falling due.

[15] As advised at the investigation meeting, Ms Thompson was entitled to have her holiday pay calculated correctly. Ms Wade has already paid \$270.00 in holiday pay to Ms Thompson.

**Ms Claire Wade is ordered to pay to Ms Thompson outstanding holiday pay of \$300.02 gross within 28 days of the date of this determination.**

**Was Ms Wade able to make the deductions for the treatments?**

[16] The employment agreement provides for deductions to be made from an employee's final pay for amounts owing to the employer. When Ms Thompson's employment ended in August 2007 Ms Wade made two deductions. One was for a Hot Stone Massage at a cost of \$45.00 and the other a Facial at a cost of \$40.00. Ms Thompson claims the deductions were unlawful and seeks reimbursement.

[17] Employees employed by Ms Wade are entitled to receive treatments and purchase products at cost price. It is a loose arrangement which has not been reduced to writing. There is a piece of paper located in the staff room and employees are expected to record all treatments or products they use. At the investigation meeting

Ms Thompson accepted that she was aware that for treatments staff would be charged the cost price.

[18] In June 2008 Ms Thompson sought and gained approval from Ms Wade to travel to Tauranga with another employee to have a hot stone treatment so that the staff in Tauranga could practice their new skills in what was a new treatment being made available for Body and Soul clients.

[19] Ms Thompson says that Ms Wade did not explain that they would have to pay for the treatment and never raised it with her between June and August when her employment ended.

[20] Ms Thompson considered she was doing Ms Wade a favour by paying for the car to travel to Tauranga to allow the staff there to practice their newly trained skills in delivering the massage. Also, she had taken the afternoon off work with no pay so that she could have the treatment.

[21] Even if Ms Wade did not explicitly advise Ms Thompson at the time that she would have to pay for the Hot Stone Treatment, Ms Thompson was aware that such treatments were to be charged to employees. There is adequate evidence before the Authority to show that the second employee who received the treatment paid for her treatment.

[22] Ms Thompson also had a facial treatment from Body and Soul. Ms Thompson says she understood she would have to pay for the product used in the facial but that there was no discussion about how much that would be. Ms Wade told me she valued that facial at a price which was \$100.00 less than Ms Wade's customers would pay for the same treatment.

[23] I am satisfied Ms Thompson was at all times aware she had to pay for any and all treatments and products she received from Body and Soul. The employment agreement between the parties allows for deductions for amounts owing to the employer. Both treatments were charged at cost, in accordance with the policy. The deductions were both lawful and reasonable.

**Should Ms Wade be required to pay for the damaged nail drill?**

[24] The employment agreement provides employees to bring their own tools to use in the workplace. The employment agreement prohibits the use of personal tools by others unless they have the approval of the owner. Ms Thompson bought a nail drill to work to assist her in doing acrylic nails for clients. Ms Thompson says the power cord on the drill got stretched as the power plug was too far away from where the drill was being used and that caused the drill to stop working properly.

[25] Ms Thompson confirmed that she was the only staff member who used the drill and that she wasn't asked to bring it into the workplace. I am not satisfied Ms Thompson has made out her case for reimbursement for a new drill. It is clear from the evidence that Ms Wade had nothing to do with the drill, and so was not complicit in it becoming damaged. The only person responsible for the damage to the drill is Ms Thompson as she was the only person who used it, and it was never a requirement that she do so.

**Costs**

[26] Costs shall lie where they fall.

**Summary of orders**

[27] Ms Clair Wade is ordered to pay to Ms Thompson within 28 days of the date of this determination wages in lieu of notice of \$2,096.56 plus \$300.02 outstanding holiday pay.

Vicki Campbell  
Member of Employment Relations Authority