

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

5137732  
CA 16/09

BETWEEN                      D A and J A WARD LIMITED  
Applicant

AND                              ANGIE MAREE WOOD  
Respondent

Member of Authority:      James Crichton

Representatives:            Judy Ward for Applicant  
No appearance for respondent

Investigation Meeting:     On the papers

Determination:              16 February 2009

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]     The applicant company (the Company) seeks reimbursement of the notice period of four weeks in the sum of \$1,181.31. The Company alleges that the respondent (Ms Wood) abandoned her employment without giving notice and that in consequence, they are entitled to rely on a forfeiture provision in The Company Handbook, which, in terms of Clause 9 of the Employment Agreement, is incorporated into the Terms and Conditions of the Employment.

[2]     In effect the provision relied on from the Handbook requires four weeks notice to be given by either party or in default of such notice four weeks wages are to be forfeited.

[3]     The total amount claimed by The Company is rebated slightly by the effect of their retention of Ms Wood's final pay of \$170.09.

[4]     The statement of problem was filed on 25 September 2008 and in accordance with usual practice, a copy of the statement of problem was forthwith made available to Ms Wood who, by letter dated 6 November 2008 responded by indicating amongst

other things that she was a good worker and did not deserve to be treated in this way by her former employers.

[5] Nothing further has been heard from Ms Wood and she has elected not to participate in anyway in the Authority's process or to provide a statement in reply or indeed to make any submissions on the matters in dispute, notwithstanding being given the opportunity to do so.

[6] Accordingly, the Authority must determine the matter on the basis of the evidence before it which comprises essentially material provided by The Company and the letter from Ms Wood that I have just referred to.

[7] Ms Wood commenced employment with The Company in the middle of 2008. Her employment application is dated 17 June 2008 and the Employment Agreement is dated the following day.

[8] By letter dated 6 August 2008 The Company wrote to Ms Wood alleging that she had failed to attend rostered shifts for work on 2, 3 and 4 August. She was given an opportunity provide some explanation for these absences within seven days of the date of the letter, in the absence of which the letter makes clear that her employment would be terminated on the basis of abandonment.

[9] There is no evidence before the Authority that Ms Wood ever received that letter or that she received it in time to respond within the timeline specified by the employer.

[10] A second letter from The Company to Ms Wood dated 14 August 2008 confirmed that her employment had now been terminated. It sought repayment of \$1,181.31 for the first time. Again there seems to have been no response from Ms Wood and accordingly The Company wrote again on 22 August indicating that the matter was being forwarded to Mediation Services of the Department of Labour for resolution.

[11] Ms Wood's only communication with the Authority suggests some significant emotional distress at the time that her employment relationship with The Company came to an end. She refers in her letter to her life being *in turmoil*.

[12] The factual position is that, for whatever reason Ms Wood, having failed to respond to the employer's initial letter in time, effectively had her employment terminated by the employer.

### **The Employment Agreement**

[13] I have already noted that the Employment Agreement includes reference to an Employee Handbook which contains the provision the employer relies upon, which requires four weeks wages to be forfeited where the employment is terminated without the provision of the requisite four weeks notice.

[14] There is no evidence before the Authority about how The Company alerted Ms Wood to her obligations under the Agreement when the employment relationship commenced. Clearly the clause The Company relies on is an onerous impost and in the normal course of events, the Authority would want to be satisfied that both parties had turned their minds to the obligations the Agreement purported to create.

[15] In the particular circumstances of this case, the only evidence available to the Authority from Ms Wood (her letter of 6 November 2008) suggests that Ms Wood may not have clearly understood the nature of the purported obligations in the Agreement. For instance she says that she was a *hard and honest worker and that the Company would attest to that* and she goes on to say *a contract is meant to aid both parties and protect the workers not hang them out and vilify the workers publicly*. The latter observation refers to Ms Wood's contention that the owners of the Company have discussed her personal circumstances publicly, thus breaching her privacy.

### **The relevant law**

[16] It is clear law that on a breach of contract action a claim for liquidated damages may lie but a penalty provision will not be upheld.

[17] I agree with my colleague Member Cheyne when he writes in Determination 5027862 *Robertson Turnbull Limited v. Labour Inspector* CA 61/08, 8 May 2008 in relation to the same clause, at para.[32]:

*The parties' intentions are to be discerned objectively from the words used in their written agreement. Considering the provision entitling the employer to retain wages until the end of the notice period, the forfeiture provision of four weeks wages for failure to work any part*

*of the notice period and the consent to deductions provision, it is clear that the intention was to secure performance of the contract by the imposition of a fine amounting to four weeks wages for any breach. Indeed the employment agreement at clause 9 specifically refers to penalties for breach of the rules.*

[18] The present case is just such a case. In effect the situation here was that because of three *no shows* by Ms Wood her employment was treated as having been abandoned after seven days and then she is encumbered with a claim for forfeiture of four weeks wages.

[19] That is unconscionable in my view. Applying *Ozturk v. Gultekin T/A Halikainas Restaurant* [2004] 1 ERNZ 572, in a breach of contract claim the Courts will not allow the recovery of a sum which is out of proportion to the loss which occurs.

[20] I am absolutely satisfied that the forfeiture of the month's pay for the three "no shows" followed by an employer decision to terminate the employment relationship, is out of all proportion to the loss which the employer may have sustained.

## **Determination**

[21] The Company has failed to satisfy me that the forfeiture of four weeks wages by Ms Wood is commensurate with the loss that The Company may have sustained by reason of her having failed to report in for three shifts at the beginning of August last year. I am supported in that conclusion by the fact that in effect, the employment relationship was brought to an end by The Company and not by Ms Wood.

[22] There will be no order against Ms Wood for the monies claimed from her by The Company but equally, I do not direct that The Company return to Ms Wood the final pay that she would otherwise have received. I consider The Company holding that final pay for its own use as sufficient recompense for any loss it may have incurred.

**Costs**

[23] Costs are to lie where they fall.

James Crichton  
Member of the Employment Relations Authority