IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

CA 3/09
5122556

	BETWEEN	MAC KENNETH GILCHRIST Applicant
	AND	WHITE GOLD LIMITED Respondent

Member of Authority:	Philip Cheyne
Representatives:	Wendy Gilchrist, Advocate for Applicant Peter Zwart, Advocate for Respondent
Investigation Meeting:	2 September 2008 at Christchurch
Further Submissions and Information received:	8 October 2008, 10 & 13 October 2008 from Applicant 23 September 2008, 17 October 2008 from Respondent
Determination:	16 January 2009

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] White Gold Limited operates dairy farms and employed Mac Gilchrist as an assistant farm manager primarily on one of its properties from June 2006 until May 2007. The employment included supplied accommodation. In May 2007 Mr Gilchrist resigned to take up other employment. There developed problems between Mr Gilchrist and White Gold Limited over holiday pay, deductions from final wages and responsibility for damage to the accommodation. Despite the involvement of the Labour Inspector and mediation, these problems have not all been resolved.

The people involved

[2] David Irvine and Carrie Irvine are the shareholders and directors of White Gold Limited. They employed Chris Botha as a farm manager and he managed the property where Mr Gilchrist worked. A number of other employees worked on White Gold Limited's properties. Louise Mann is one of the other employees who worked on another property. During their employment she and Mr Gilchrist formed a domestic relationship and Mr Gilchrist moved into her supplied accommodation. Later they shifted into the accommodation which is the subject of the dispute. Wendy Gilchrist is Mr Gilchrist's mother. She became involved in advising and representing Mr Gilchrist at the termination of the employment relationship.

The employment agreement

[3] There was a written employment agreement between White Gold Limited and Mr Gilchrist. Under the agreement, Mr Gilchrist was employed full time on an annual salary paid fortnightly. He was required to work such hours as stipulated by the employer and in conjunction with the employer's work roster. The agreement also included provisions relating to the supplied accommodation. It also entitled WGL to charge $50 per week by deduction from the wages. In several places the employment agreement authorised the employer to deduct any moneys owed to it by the employee.

Termination of the employment

[4] Mr Gilchrist gave notice of resignation for his employment to end on 13 May 2007. Ms Mann also gave notice for her employment to end on 28 May 2007. By this time, they had been living at 246 East Maddisons Road for about three months.

[5] Mr Irvine's evidence is that he and Mrs Irvine personally inspected 246 East Maddisons Road in May 2007 while Ms Mann was present. Ms Mann's evidence is that there was no inspection in May 2007 when she was present. It is not necessary to resolve the disagreement. It is undisputed that there was some discussion between Mr Gilchrist and Mr Irvine at some point about liability for property damage. Also at some point there was discussion between Mr Gilchrist and Mr Irvine about damage to an irrigator.

[6] As early as 4 April 2007, there was some discussion between Mr Gilchrist and his mother and Mrs Gilchrist and her accountant about issues arising from

Mr Gilchrist's employment situation likely to crystallise upon its termination. The accountant gave some advice about statutory holiday entitlements, whether Mr Gilchrist could be liable for accommodation cleaning costs at the termination of the employment, whether Mr Gilchrist could be liable for damage to the irrigators and Mr Gilchrist's annual holiday entitlement. The accountant formalised his advice about these issues in a letter dated 7 May 2007. In addition, the letter drew attention to Mr Gilchrist's right under the Wages Protection Act 1983 to withdraw consent for the employer to make deductions from his wages.

[7] On or about 9 May 2007, Mrs Gilchrist wrote a letter to Mr Irvine. It expressed thanks for Mr Gilchrist's employment, his desire to leave on good terms and Mr Gilchrist's view that he should not be responsible for damage to the irrigator and cleaning or repairs for the accommodation. The letter referred to the accountant's letter dated 7 May as being enclosed giving an estimate of Mr Gilchrist's final pay. The letter also records Mr Gilchrist's withdrawal of any consent for the employer to make any deductions from his pay. Mrs Gilchrist gave her letter and the enclosed accountant's letter to Mr Gilchrist to deliver to his employer.

[8] Mr Gilchrist's evidence is that he put this letter into Mr Irvine's letterbox. No one else was present when he did this. Mr Irvine's evidence is that he never received the 9 May 2007 letter or the copy of the accountant's letter during the employment relationship. White Gold Limited therefore relies on the employment agreement as lawful authority for the deductions made from Mr Gilchrist's final pay.

[9] I find that Mr Gilchrist probably did put the 9 May 2007 letter including a copy of the 7 May 2007 accountant's letter in Mr Irvine's letterbox. The prospect of some dispute about her son's final pay had caused Mrs Gilchrist to go to some lengths to get advice and formulate a reasonable approach to avoid any possible dispute as expressed in her letter. Mr Gilchrist was charged with delivering this letter and there is no reason to think that he did not place it in Mr Irvine's letter box.

[10] I do not accept Mr Irvine's evidence that WGL did not receive these letters. Mr Irvine confirmed that the letterbox was ordinarily used by him to receive mail. There is no reason apart from Mr Irvine's denial to think that any unauthorised person took the letter from the box. The final pay slip for Mr Gilchrist shows a payment of half time extra for work on six statutory holidays during the employment. The earliest of these days was 17 November 2006 and the last was 25 April 2007. These

payments had not been made in the relevant pay periods. The 7 May 2007 letter from the accountant specifically referred to Mr Gilchrist's entitlement to half time extra for work on statutory holidays. The obvious inference is that Mr Irvine realised that WGL was obliged to pay half time extra for statutory holidays worked and Mr Gilchrist was claiming this payment because he saw the accountant's letter. I asked Mr Irvine why the payments for work on statutory holidays were made at the end of the employment rather than in each relevant pay period as should have been the case. He gave no satisfactory explanation. In the absence of a satisfactory explanation I infer that the half time extra was paid because WGL saw the accountant's letter. That means that WGL must have seen Mrs Gilchrist's letter including the withdrawal of consent for deductions.

[11] Mr Gilchrist received a normal fortnight's pay on 9 May 2007. There is no dispute about this pay or the deductions from it.

[12] Mr Gilchrist ceased work on 13 May 2007. Pay for this extra work and holiday pay as calculated by WGL was not paid to Mr Gilchrist until 30 May 2007. Mr Irvine told me that his usual practice was to pay an employee their final wages when they vacate the accommodation so that any rent, costs or damage could be accounted for from the final pay. The employment agreement gives an employee up to a week normally after the termination of the employment to vacate the property. Mr Gilchrist and Ms Mann vacated 246 East Maddisons Road on or about 30 May 2007. For this conclusion I am relying on Mr Irvine's diary entry. Mr Gilchrist's evidence is that he could not leave sooner because he had no money to do so having not received his final pay.

[13] There is a dispute in the evidence about whether Mr Gilchrist and Ms Mann cleaned the premises before leaving. Mrs Gilchrist's evidence is that she went there with mops, a broom and vacuum cleaner and that she and Ms Mann cleaned most of the premises. Ms Mann's evidence is that they left the property in a cleaner state than they found it when they moved in. Mr Irvine's evidence is that he and Mrs Irvine inspected the house on or about 30 May 2007. They found it in a very dirty state with a lot of food left in the kitchen and in drawers. In response, Ms Mann said that these items were left there by the previous occupants. There is no evidence on behalf of White Gold Limited to establish the state of the property at 246 East Maddisons Road when Mr Gilchrist and Ms Mann moved in. There is no reason to doubt

Mrs Gilchrist's evidence about cleaning up. I also accept Ms Mann's evidence that they did not clean up all the previous occupants' mess but did otherwise clean the property.

[14] Because Mr Gilchrist stayed on at the property after the end of his employment, White Gold Limited deducted from his final pay the same rental charge that had applied during his employment. Deductions were also made for cleaning ($100) and damage to the carpet (a total of $150).

[15] There is evidence that WGL treated Mr Botha differently in respect of damage when he left the employment. That is between those parties and makes no difference to the rights and responsibilities between WGL and Mr Gilchrist.

[16] In about June 2007, Mr Gilchrist complained to a Labour Inspector about underpayment of holiday pay, unauthorised deductions from wages, delay in being paid his final pay and several ancillary issues. While the Labour Inspector was able to determine or resolve some of the complaints, there remain a number of issues for determination.

Salary/holidays owed

[17] Mrs Gilchrist submits that the work record originally provided should be used to conclusively determine which days were worked and which days were not worked. The problem with that position is demonstrated by considering what would happen if the original records reported fewer working days than was actually the case. The task for the Authority is to establish an accurate picture of when Mr Gilchrist worked, when he had time off, the reasons for that and whether there was any underpayment. Mr Botha gave evidence that the subsequently provided document is a full print out of the contemporaneous record maintained by him on his computer. There is no reason to doubt Mr Botha's evidence so the subsequent print out represents the best evidence of when Mr Gilchrist worked, when he did not work and the reasons for any time off. I accept the subsequently provided document as an accurate record.

[18] Mr Gilchrist started work on 7 June 2006 and his last day of work was 13 May 2007, a total of 341 days. It is common ground that Mr Gilchrist was entitled to two days off for every eight days worked. The work does not appear to have always followed this 8/2 pattern but I will take it as the contractual basis for the following calculations.

[19] Applying the 8/2 roster entitlement across the whole of the employment, Mr Gilchrist was entitled to 68.2 non-work or rostered days off. It is common ground that Mr Gilchrist worked on six statutory holidays and so was entitled to 6 alternative holidays either given during the employment or paid at the end. Mr Botha's record shows that Mr Gilchrist had 71.5 non-work days inclusive of time attributed by Mr Botha in his records as alternative holidays. This excludes some annual holidays taken in advance about which there is no dispute. 1 May and 2 May 2007 are recorded as Mr Gilchrist being sick but are included in the 71.5 day total. Sick days should not be included. Accordingly a total of 69.5 days were given during the employment as either non-work rostered days off or as alternative holidays when 74.2 days should have been allowed under these categories. It follows that Mr Gilchrist is still entitled to 4.7 days' pay.

[20] I should say a little more about sick days. Mr Gilchrist was sick occasionally throughout his employment. He may have received his full salary on such occasions even before he became entitled to paid sick leave. Those occasions cannot now be called in aid to make up for the employer's non-observance of other entitlements such as rostered days off or alternative holidays.

[21] I acknowledge that there is an element of *post facto* reconstruction about the arrears calculation, but it arises because of WGL's attempt under the employment agreement to treat rostered days off as alternative holidays and avoid honouring Mr Gilchrist's entitlement to an alternative holiday whenever he worked on public holidays. That provision in the employment agreement is plainly unlawful and an employee such as Mr Gilchrist is entitled to recover arrears based on their statutory entitlements despite the contract. I understand that WGL has now redrafted its employment agreements to comply with the law.

Deductions

[22] Given the finding above that Mr Irvine received the 9 May 2007 letter withdrawing consent provided by the employment agreement for deductions, the deductions of $250 for cleaning, carpet damage and the carpet stain recorded in the final pay slip are illegal and therefore recoverable by Mr Gilchrist pursuant to the Wages Protection Act 1983.

[23] Mr Gilchrist acknowledged responsibility for some damage to the carpet caused by a limestone block and spilling coffee. The amounts deducted for these two issues ($100 and $50) were discussed and agreed between Mr Gilchrist and Mr Irvine. Even though the deductions from Mr Gilchrist's wages were unlawful, there is no sense now in ordering White Gold Limited to repay the deductions to Mr Gilchrist when Mr Gilchrist would then need to pay the same amounts back to White Gold Limited to cover the admitted damage.

[24] There was also $100 deducted for cleaning. The individual employment agreement says that the employer must provide a reasonable standard of accommodation to be maintained by the employee in a clean and tidy condition. Both parties produced photos of the property. Each set of photos included a date stamp. Mrs Gilchrist in particular did not accept that the photos produced by White Gold Limited were taken on 1 June 2007. At least some of these photos were provided to the Labour Inspector some time before September 2007. There is also an invoice dated 20 July 2007 for cleaning done at 246 East Maddisons Road and an invoice dated September 2007 for painting to the house. The photos provided to the Labour Inspector were probably taken before the cleaning was done. Given that I accept that the photos produced by White Gold Limited were probably taken on 1 June 2007, being the date marked on the print provided.

[25] The set of photos produced for Mr Gilchrist are marked 18 July 2008 and I accept that these photos were taken that day. What the two sets of photos demonstrate is that the professional cleaning and painting made little difference to the overall state of the property. For example, there is little difference between the two sets of photos in the appearance of the oven, the toilet and the basin. In the end, however, there is nothing to establish the state of the property in February or March 2007 when Mr Gilchrist and Ms Mann moved in so I cannot say that it was left in a worse state when they moved out in May 2007. For that reason, I find that there was no liability under the employment agreement for Mr Gilchrist to pay $100 in respect of cleaning. The deduction was unlawful under the Wages Protection Act 1983 as well. Mr Gilchrist is entitled to recover the $100 deduction.

[26] The last disputed deduction from the final pay is $100 being two periods of rental at $50 per week for Mr Gilchrist's continued occupancy of the property. I assume that the rental periods correspond with the pay periods so Mr Gilchrist paid

rent up to and including 9 May 2007 with his penultimate pay. That means that the rent deducted from his final pay covered the period up to and including 23 May 2007. The employment agreement permitted Mr Gilchrist to occupy the premises and WGL to change rent until 20 May 2007. While the deductions as far as they relate to this period breached the Wages Protection Act 1983 there is little point in permitting Mr Gilchrist to recover the illegal deduction and then ordering him to pay the same amount to WGL. However the $100 deduction exceeded the period for which rent could be charged under the employment agreement by three days (from 21 to 23 May inclusive). Mr Gilchrist is entitled to recover that amount ($21.43) as an unlawful deduction.

[27] Mr Gilchrist says that he was unable to vacate the premises earlier because he was not paid his final pay and had no money to leave. I do not accept that as the principal reason for him not vacating the property. He and Ms Mann had both obtained other employment so it is more likely that Mr Gilchrist was waiting for her employment to end before they both left.

[28] To some extent this whole dispute was caused by WGL's delay in paying Mr Gilchrist his final wages. I have noted above Mr Irvine's explanation for the timing of the payment. The employment agreement says *In the event of termination the Employee will be paid all remuneration, which may be due to the Employee at the date of such termination ….* The requirement was to pay Mr Gilchrist when his employment ended, not more than two weeks later. However WGL wanted to protect itself by retaining control of Mr Gilchrist's final pay and its ability to take deductions until he left the property. It acted unlawfully in doing so. There is no claim for a penalty for breach of the employment agreement or for breach of the Wages Protection Act 1983 so no penalty can be ordered. The statement of problem included a claim for interest to cover the delay but the payment had been made long before the proceedings were initiated so there is no basis for ordering interest. Late in the piece there emerged a claim for compensation for distress relating to the delay in receiving final wages. It would be unfair now to treat the matter as a grievance.

Counter-claim

[29] There is evidence to the effect that the cost of the carpet damage and cleaning exceeded the sums agreed and deducted from Mr Gilchrist's final wages. It is controversial not least because the carpet has not been replaced. However the point

does not need to be determined because the effect of this determination is to uphold the agreement in respect of carpet damage. I have also determined that Mr Gilchrist was not liable under the employment agreement for any cleaning costs so no more need be said about that.

Summary of orders

[30] White Gold Limited is pay Mr Gilchrist arrears of holiday pay amounting to 4.7 days pay. Leave is reserved in case of any difficulty with the calculation. WGL must pay Mr Gilchrist the net payable (plus interest as below) and account for any PAYE deduction.

[31] White Gold Limited is to repay to Mr Gilchrist illegal deductions totalling $121.43.

[32] White Gold Limited is to pay interest on both these sums at the rate of 6% per annum from 13 May 2007 until the sums are paid in full.

[33] Costs are reserved. Mrs Gilchrist has claimed for the cost of her accountant's advice prior to the proceedings being lodged but that is not a cost that will be allowed. The costs that are recoverable are legal fees incurred in pursuing the proceedings and disbursements such as the lodgement fee. If the question of costs cannot be resolved between the parties any claim must be made in writing to the Authority within 28 days and the other party may lodge a reply within a further 14 days.

Philip Cheyne
Member of the Employment Relations Authority