

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2015] NZERA Auckland 42
5521438**

BETWEEN ANDREW HOWARD
 Applicant

AND MITRE 10 (NEW ZEALAND)
 LIMITED
 Respondent

Member of Authority: Eleanor Robinson

Representatives: Applicant in person
 Richard Upton, Counsel for Respondent

Investigation Meeting: On the papers

Determination: 9 February 2015

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] A Record of Settlement (the Settlement Agreement) was signed under s 149 of the Employment Relations Act 2000 (the Act). The parties to the Settlement Agreement were the Applicant, Mr Andrew Howard and the Respondent, Mitre 10 (New Zealand) Limited (Mitre 10). The Settlement Agreement was signed by Mr Howard and by Mr Lloyd Pinder, authorised signatory for Mitre 10.

[2] The Settlement Agreement dated 29 August 2014 had also been signed by a mediator from the Mediation Services of The Ministry of Business, Innovation and Employment (MBIE).

[3] The issue now brought before the Authority by Mr Howard is that Mitre 10 has breached the Settlement Agreement by unlawfully making deductions/adjustments to his final pay by the deduction of the sum of \$2,307.84 in respect of holiday pay entitlement.

[4] The Settlement Agreement was certified under s 149 of the Act by the Mediator. That certification confirmed that before making the agreement, the parties were advised and accepted that they understood the agreed terms:

- (i) were final, binding and enforceable; and
- (ii) could not be cancelled; and
- (iii) could not be brought before the Authority or the court for review or appeal, except for the purposes of enforcing those terms.

[5] The Mediator in signing the Settlement Agreement had further noted that in doing so she was: “*comfortable that the terms of settlement accord with section 148A*”.

[6] Section 148A of the Act applies to minimum entitlements and specifies at s.148A(2) that a mediator: “*must not sign agreed terms of settlement in which a party agrees to forgo all, or part, of the party’s minimum entitlements.*”

Agreed Statement of Facts

[7] The parties requested that the matter before the Authority be determined based on an agreed Statement of Facts submitted by the parties on 10 December 2014.

[8] On or about 18 December 2013, the parties entered into a written individual employment agreement (the Employment Agreement).

[9] Among other things, the Employment Agreement contained the following clauses:

16 – Your obligations on termination

16.1 ...

16.2 If you owe us any money and/or have not returned any company property to us (for whatever reason) we may deduct the amount and/or value that you owe us from your final pay and/or from your unused annual leave.

28. Variation

This agreement can only be varied in writing and the variation must be signed by both parties.

[10] Throughout his employment, Mr Howard was paid his first monthly salary on the 15th of each month. This was pay for the whole of the calendar month meaning Mr Howard was paid two weeks in advance, two weeks in arrears.

[11] In August 2014, Mitre 10 indicated to Mr Howard that it wished to commence a formal disciplinary process about various matters. Mr Howard engaged independent solicitors to represent him. The parties became involved in settlement discussions.

[12] While discussions about the disciplinary processes and/or potential settlement were ongoing, Mitre 10 paid Mr Howard his salary for the full calendar month of August 2014. This was paid on 15 August 2014 in the usual manner.

[13] On Friday, 22 August 2014, Mitre 10 presented an offer of settlement to Mr Howard (the Offer). The Offer contained the following relevant conditions:

- (a) Mr Howard's employment would end, by reason of resignation, effective from 5pm on Monday, 25 August 2014;
- (b) Mitre 10 provide Mr Howard with all salary and annual leave that may be owing up to and including the termination date only;
- (c) Mr Howard waived his notice period.

[14] On 25 August 2014, Mr Howard accepted the Offer. Accordingly, the employment relationship between the parties ended at 5pm on Monday, 25 August 2014 (the Termination Date).

[15] On 29 August 2014, the parties entered into the Settlement Agreement which was signed off pursuant to s.149 of the Act.

[16] Clause 1 of the Settlement Agreement noted that Mr Howard had resigned from his employment effective 5pm on Monday, 25 August 2014.

[17] Pursuant to clause 2 of the Settlement Agreement, Mr Howard agreed to waive his notice period, with the effect of Mitre 10 taking no further steps in relation to the disciplinary process it was looking to commence.

[18] Pursuant to clause 3 of the Settlement Agreement, Mitre 10 agreed to pay Mr Howard:

All salary and annual leave entitlement owing (if any) up to and including 5pm on the termination date.

[19] Mitre 10 calculated what salary was owing to Mr Howard pursuant to clause 3 of the Settlement Agreement.

[20] As noted above, on 15 August 2014 Mr Howard had been paid his monthly salary consisting of two weeks in arrears and two weeks in advance. The result of this was that he had been paid for four working days which fell after the Termination Date, namely 26, 27, 28 and 29 August 2014.

[21] Mitre 10 made an adjustment to Mr Howard's final pay so as to recover the salary he had been paid for 26, 27, 28 and 29 August 2014.

[22] At the time of termination, Mr Howard was paid \$150,000.00 per annum gross, or \$576.92 per day gross.

[23] The amount of money that Mitre 10 claims Mr Howard had been paid in error and which has been deducted from Mr Howard's final gross pay is \$2,307.69 gross representing the four working days which fell after the Termination Date.

The Settlement Agreement

[24] The Settlement Agreement contained the following clauses:

3. The Employer will pay the Employee all salary and annual leave entitlements owing (if any) up to and including 5 pm on the termination date.

4. Subject to this settlement agreement having been signed by both parties and a Mediator from the Ministry of Business, Innovation and Employment, the Employer will:

(i) pay the Employee, within 14 days, the sum of \$8,500 pursuant to section 123(1)(c)(i) of the Act;

(ii) contribute the sum of \$2,000 + GST towards the Employee's legal fees on receipt of an invoice from the Employee's solicitors; and

(iii) provide the employee with a positive written reference and it will consult with the Employee about the terms of this before finalising it.

7. In reaching the agreement contained in the settlement agreement, the parties confirm that neither has agreed to forego minimum entitlements (being monies payable under the Minimum Wage Act 1983 and/or the Holidays Act 2003.

9. The parties acknowledge that, except as set out within the settlement agreement, no other money whatsoever (including but not limited to money arising in any way from the employment relationship such as in relation to leave entitlements, salary, bonuses, redundancy

compensation, compensation, damages, interest, and/or costs) is due or owing from either party to the other.

Determination

Holiday Payment

[25] Mr Howard's holiday pay entitlements are to be made in accordance with the Holidays Act 2003.

[26] Mr Howard's employment commenced on 13 January 2014 and terminated on 25 August 2014. As the period of employment is less than 12 months, it is to be calculated in accordance with s. 23 of the Holidays Act 2003 which states at s 23(2):

An employer must pay the employee 8% of the employee's gross earnings since the commencement of employment, less any amount-

- (a) Paid to the employee for annual holidays taken in advance; or*
- (b) Paid in accordance with section 28.*

[27] Gross earnings are defined in s 14 of the Holidays Act 2003 which states:

In this Act, unless the context otherwise requires, gross earnings, in relation to an employee for the period during which earnings are being assessed, -

- (a) Means all payments that the employer is required to pay to the employee under the employee's employment agreement, including, for example:*

- (i) salary or wages:*

[28] Mr Howard was paid \$150,000.00 per annum gross, or \$576.92 per day gross.

[29] There are 161 working days in the period from the commencement of Mr Howard's employment with Mitre 10 on 13 January 2014 until it terminated on 25 August 2014, therefore under the terms of the Employment Agreement he was entitled to be paid \$92,884.12, equating to Mr Howard's gross earnings since the commencement of his employment.

[30] Pursuant to s 23(2) of the Holidays Act 2003, Mr Howard's holiday pay entitlement is \$6,853.81 (calculated as 8% of \$92,884.12 less \$576.92 being one day's holiday taken on 23 May 2014).

[31] The termination date of Mr Howard's employment is 25 August 2014 as set out at clause 1 of the Settlement Agreement, therefore the days of 26, 27, 28 and 29 August 2014 cannot be classified as holiday taken in respect of the calculations necessary under the Holidays Act 2003.

[32] Clause 3 of the Settlement Agreement states that Mitre 10 will pay Mr Howard all annual leave entitlements owing. I find that there is no provision in this wording which allows Mitre 10 to withhold any part of Mr Howard's entitlement to holiday pay.

[33] Moreover it is trite law that parties cannot contract out of statute, and this is recognised in clause 7 of the Settlement Agreement.

[34] I determine that at the date of the termination of Mr Howard's employment on 25 August 2014 he was entitled to receive statutory holiday pay of \$6,853.81 gross.

Salary Payment

[35] In order to make any deduction from an employee's salary, the employer must obtain the employee's consent to do so pursuant to clause 4 of the Wages Protection Act 1983 which governs the payment of wages between an employer and an employee. Clause 4 states:

4. No deduction for wages except in accordance with Act

Subject to sections 5 (1) and 6(2) of this Act, an employer shall, when any wages become payable to a worker, pay the entire amount of those wages to that worker without deduction.

5. Deductions with worker's consent

(1) An employer may, for any lawful purpose, -

(a) with the written consent of a worker; or

(b) on the written request of a worker-

Make deductions from wages payable to that worker.

[36] As set out in Schedule 1 of the Employment Agreement Mr Howard's salary of \$150,000.00 per annum was to be paid:

Pay Frequency: *On the 15th of every month (or the next consecutive working day when affected by a Public Holiday), representing 1/12th of your annual remuneration, paid into your nominated account.*

[37] Due to the fact that the number of working days (Monday – Friday) can vary in a calendar month, the annual salary of \$150,000 would only be completely paid when a full year of employment had been completed. As a result the monthly payment of \$12,500 represented either an overpayment or underpayment of wages depending upon the number of working days in the relevant month.

[38] In the period 13 January 2014 – 25 August 2014 there were 161 working days; under the terms of the Employment Agreement Mr. Howard was therefore entitled to be paid total salary of \$92,884.12, but due to the method of payment utilised received a total of \$96,153.80.

[39] Clause 16.2 of the Employment Agreement provided Mitre 10 with a right to deduct any monies owed to it by Mr Howard at the date of termination.

[40] On 15 August 2014 Mr Howard received his monthly salary payment which included two weeks payment in advance of the monies having been earned by him. Upon the termination of the employment relationship prior to the end of that payment period I accept that, in accordance with clause 16.2 of the Employment Agreement, Mitre 10 would be entitled to deduct the amount of monies owed in respect of the salary overpayment.

[41] Subsequent to 15 August 2014 the Offer was presented to Mr Howard with a view to resolving the disciplinary situation which had arisen between the parties during August 2014. The Offer was made on 22 August 2014 and was accepted by Mr Howard on 25 August 2014, with the Settlement Agreement being concluded on 29 August 2014.

[42] Clause 3 of the Settlement Agreement states that

3. *The Employer will pay the Employee all salary and annual leave entitlements owing (if any) up to and including 5 pm on the termination date.*

[43] Clause 9 of the Settlement Agreement contains an acknowledgement by the parties that there were no monies due or owing by either party to the other. The clause specifically refers to the parties acknowledging that: “... *except as set out within the settlement agreement, no other money whatsoever ...arising in any way from the employment relationship such as in relation to ... salary,, ...is due or owing from either party to the other*”

[44] Despite the overpayment, I find no provision in the wording of the clauses in the Settlement Agreement which specifically provides for Mr Howard to make any payment to Mitre 10.

[45] In the Employment Court case *Electrical Union 2001 Incorporated & Cowell v Mighty River Power*¹ a case which considered the application, interpretation or operation of a collective agreement, Chief Judge Colgan stated :

[28] *in these circumstances, and also in the absence of any real ambiguity in the relevant words or phrases used, I must assume an intention by the parties to mean what is ordinarily taken from those words in the context of the collective agreement as a whole and having regard to the nature of the work performed by the employees subject to it*

[46] I consider that the observation made by the Chief Judge as to the intention of the parties is also relevant to consideration of what the parties intended by the wording of the Settlement Agreement.

[47] At the time of making the Offer, I consider that Mitre 10 would, or should, have been fully aware of the implications of the salary payment which had been made to Mr Howard on 15 August 2014.

[48] While clause 3 of the Settlement Agreement refers to all salary payments: “*up to and including 5pm on the termination date*”, I consider that if Mitre 10 had intended that Mr Howard should repay any salary overpayment following the date of termination, it was open to it to have reflected this intention in the wording in clause 9 of the Settlement Agreement.

¹ [2013] NZ EmpC 197

[49] However it chose not to do so but used the clear and unambiguous wording that, other than what had been set out in the Settlement Agreement, no other money whatsoever: “ *was due or owing from either party to the other.*”

[50] I find the wording of clause 9 of the Settlement to be lacking in any real ambiguity, it clearly states that: “*except as set out in the settlement agreement,*” no other monies were owed by either party. In effect constituting a variation to the terms contained and agreed by the parties within the Employment Agreement.

[51] I find that by Mr Howard in accepting the Offer on 25 August 2014 made by Mitre 10, it agreed to the variation. On 29 August 2014 both parties signed the Settlement.

[52] Accordingly I find that the variation was in writing and signed by both parties in accordance with clause 28 of the Employment Agreement.

[53] I determine that Mitre 10 incorrectly calculated Mr Howard’s holiday pay entitlement pursuant to the Holidays Act 2003 and clause 3 of the Settlement Agreement, and also in deducting from Mr Howard the sum of \$2,307.69 gross representing the salary payment for 4 working days falling after the Termination Date was in breach of clause 9 of the Settlement.

[54] I determine that the Respondent has failed to comply with clause 9 of the Settlement.

[55] **In order to effect compliance with clause 9 of the Settlement, I therefore order Mitre 10 to pay Mr Howard, no later than 14 days from the date of this determination, the outstanding amount of \$2,046.31 (calculated as \$6,853.81 (Holiday Pay due, less \$4,807.50 already paid).**

[56] Mr Howard is also to be reimbursed the filing fee of \$71.56.

Costs

[57] While costs are reserved, I note here that, subject to his submissions, Mr Howard represented himself and, unless he incurred legal costs, it is therefore unlikely he has grounds to claim a contribution to any fair and reasonable costs.

Eleanor Robinson
Member of the Employment Relations Authority