IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2018] NZERA Auckland 20
3013272

	BETWEEN	SATISH KUMAR KALERA Applicant
	AND	SIMPLY SECURITY LIMITED Respondent

Member of Authority:	Jenni Trotman
Representatives:	Applicant in person Geoff O'Sullivan, Counsel for the Respondent
Investigation Meeting:	On the papers
Submissions Received:	11 November 2017 and 18 December 2017 from Applicant 29 November 2017 and 15 December 2017 from Respondent
Date of Determination:	19 January 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. Simply Security Limited breached s 4 of the Wages Protection Act 1983 by making unlawful deductions from Mr Kalera's salary.

B. Simply Security Limited is ordered to pay Mr Kalera the following sums within 14 days of this determination:

a. The sum of $1,773.67 for the unlawful deductions; and

b. The sum of $71.56 for costs.

Employment relationship problem

[1] Simply Security Limited provides security services to both public and private clients. Mr Kalera was employed in a permanent capacity by Simply Security on 28 February 2017. He held this position until 21 May 2017.

[2] On 13 and 23 March 2017, Mr Kalera was involved in two accidents whilst driving the company's vehicles. Simply Security determined that Mr Kalera was responsible for the accidents and, following notification to him, made deductions from his wages for the cost of the repairs.

[3] Mr Kalera says the deductions were unreasonable and were made without his consent. He seeks recovery of the amounts deducted.

[4] Simply Security denies the deductions were unreasonable or made without Mr Kalera's consent. It further claims that Mr Kalera breached the individual employment agreement by failing to comply with its vehicle policy and to make payment for outstanding vehicle repairs. It seeks a penalty to be imposed against Mr Kalera.

[5] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded all the evidence and submissions received from Mr Kalera and Simply Security but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

The issues

[6] The issues to be determined are:

(a) Were the deductions made by Simply Security from Mr Kalera's wages in accordance with the provisions of the Wages Protection Act 1983? If not, what monies are owing to Mr Kalera?

(b) Did Mr Kalera breach the individual employment agreement by failing to comply with Simply Security's vehicle policy, i.e. by failing to pay monies outstanding for vehicle repairs? If so, should a penalty be awarded to Simply Security and in what sum?

Background against which issues are to be determined

[7] The terms of Mr Kalera's employment were governed by a written individual employment agreement (IEA) dated 28 February 2017. Other employment related documents were signed the same day, including the Company Vehicle Policy which Mr Kalera agreed to be bound to pursuant to clause 1.2 of the IEA.

[8] The relevant terms of the Vehicle Policy were:

> 7. Accidents Penalties:
>
> In the event of the driver suffering a careless "own fault" accident/collision, the driver will be held responsible for the following contribution towards costs of repair as outlined in clause 6.6 of this policy.
>
> - First incident: 50% (half of insurance excess)
> - Second incident: 100% (full of insurance excess)
> - Third incident: 100% and have their employment as a mobile patrol officer reviewed.
>
> Note: that this clause does not limit the Company to pursue employees for total costs as outlined under clause 6.0 of this policy.
>
> 12. Acknowledgement:
>
> … The employee agrees that the employer may deduct all sums owed by the employee as outlined in this policy, relating to traffic infringement costs, fuel costs, accidents, accident penalties, and damaged vehicles from any money held by the employer including outstanding wages, holiday pay or time in lieu to cover unpaid sums that may remain when the employees employment is terminated for whatever reasons.

[9] On 13 March 2017 Mr Kalera damaged a company vehicle when he scraped the side of the vehicle against a low pillar whilst reversing. On 23 March 2017 Simply Security says Mr Kalera was involved in another accident. It is alleged that he reversed a company vehicle into a stationery vehicle causing damage to that vehicle. Mr Kalera disputes responsibility for this accident.

[10] On 6 April 2017 Simply Security met with Mr Kalera to discuss the accidents. The meeting was recorded, and I have reviewed that recording. The relevant facts arising from that meeting were:

(a) Mr Kalera accepted he had caused damage to the company vehicle on 13 March 2017. However, he disputed liability on the grounds that he was not careless as the pillar was not visible;

(b) Mr Kalera denied being involved in an accident on 23 March 2017. He claimed that as he was reversing the company vehicle he caught sight of damage to another vehicle. He felt he was duty bound to contact the owner and then wait to point the damage out to the owner when they returned to the vehicle.

(c) Mr Kalera advised Simply Security that his version of events could be corroborated if Simply Security was to contact the Police who he spoke to on the evening of 23 March 2017. He also referred to a witness who viewed the incident and who also spoke to the Police. Lastly, Mr Kalera produced photographs which he said supported his version of events.

(d) Clause 7 of the Company Vehicle Policy was discussed. Mr Kalera was advised that pursuant to Clause 7 he was responsible for payment of 50% of Simply Security's insurance excess in relation to the accident on 13 March 2017 and 100% in relation to the accident on 23 March 2017. He was advised that Simply Security's insurance excess on vehicles was $2,000.

(e) Simply Security advised Mr Kalera that it had obtained quotations for the repair works.

    (i) For damage to Simply Security's vehicle arising from the 13 March 2017 accident the quotation was $690. Mr Kalera disputed this sum. He was therefore offered the opportunity to obtain his own quotation for the remedial work. It was agreed that if a reasonable quotation was obtained, which both parties agreed upon, Mr Kalera would sign a wage deduction form for that amount;

    (ii) For damage to the civilian vehicle arising from the 23 March 2017 accident Simply Security obtained several quotations. These were provided to Mr Kalera. Simply Security advised Mr Kalera that it was accepting the least expensive quotation which was $1,391.50. Mr Kalera said he would not sign a deduction form for the second accident because he didn't cause the damage to that vehicle.

[11] Having not received any alternative quotations from Mr Kalera, at 5.32 pm on 11 April 2017 Simply Security wrote to Mr Kalera. It advised that deductions in relation to the accident on 13 March 2017 would commence the following day. Mr Kalera was advised that the amount that would be deducted from his salary would be $138 per week for 5 weeks.

[12] At 6.15 pm that evening Mr Kalera wrote to Simply Security advising that he did not agree to any deductions.

> I have not agreed for any deductions. I had very specifically told that this amount is too high and I dont agree with the said amount. Neither the management had followed any procedure in collecting the quotations nor the section 6 and 7 are applicable in the said incident.
>
> The language of section 7, as was inferred and quoted by Mr Graeme is entirely different than what is stated on paper.
>
> Neither I agreed for any deadline of day or date as you must be aware that I was working till Sunday 1900 Hrs.
>
> I am again stating very clearly that I don't agree with the deductions and please share with me the infringement letter which was stated in the letter dated 24 March 2017 and was kept in my file according to the letter. You are not sharing adequate information or say hiding information from me.
>
> While there is no excess charges payment made to any insurance company, I can not be held liable for any penalty.
>
> I again request you to share with me the details so that I can decide my next course of action.

[13] On 20 April 2017, Mr Kalera again wrote to Simply Security:

> The simply management is deducting money from my salary without providing any details of the deduction (why and how the figure has reached), reasons for the deductions and the clause of the contract under which the deductions are being made. I request you to reimburse all the deductions made without my consent.
>
> Please provide me in writing about the details of the deductions (why and how the figure has reached), reasons for the deductions and the clause under which the deductions are being made.

[14] On 20 April 2017 Mr Kalera tendered his resignation.

[15] On 21 April 2017 Simply Security wrote to Mr Kalera requesting him to attend another meeting on 24 April 2017. The purpose of the meeting was to enable Mr Kalera to respond to two witness statements which had been obtained by Simply Security. These witness statements conflicted with Mr Kalera's account of the events which took place on 23 March 2017. This letter followed numerous text message

exchanges between the parties on 18 April and 20 April 2017 where Mr Kalera was invited to attend a meeting without success. Mr Kalera was advised that if he did not attend the meeting on 24 April 2017 then Simply Security would make a decision based on the information that they had.

[16] Mr Kalera responded that same day disputing responsibility for the accident. He stated that the eye witness statement was fabricated and the statement made by the owner of the vehicle was incorrect. He reiterated his version of events and raised concerns about Simply Security's failure to address the timing discrepancies between the eye witness statement and that of the owner of the vehicle, the GPS logs of the Company vehicle, and the run sheet. He advised that he felt that any meeting would be futile.

[17] On 3 May 2017 Simply Security wrote to Mr Kalera advising that as he had failed to attend the meeting on 24 April 2017 it would be deducting the sum of $1,391.50 from his wages in accordance with the motor vehicle policy. It advised the deductions of $138 per week would continue until this sum was paid.

[18] Between 12 April 2017 and 24 May 2017 Simply Security made deductions from Mr Kalera's wages totalling $1,773.67. This sum was deducted by way of deductions of $138 on the 12, 19 and 26 April and 3 and 10 May 2017. Secondly by way of deductions of $139.15 on 10 May 2017 and 17 May 2017 with a final deduction of $805.37 on 24 May 2017.

Issue One: Were the Deductions made from Mr Kalera's wages in accordance with the provisions of the Wages Protection Act 1983?

[19] Section 4 of the Wages Protection Act 1983 requires an employer to pay the entire amount of wages to an employee without deduction. Section 5 creates an exception. An employer may make deductions from wages payable to a worker where the written consent of the employee has been provided. This includes consent in a general deductions clause in the worker's employment agreement but only where the employer first consults with the employee. Section 5A provides that a deduction made under a general deduction clause, in reliance on s 5, must not be unreasonable.

[20] In *Jonas v Menefy Trucking Ltd*[1], Ford J held that where a general deductions clause in an employment agreement is relied upon to make a deduction from wages payable, rather than an individualised written consent, then consistent with its good faith obligations under the Act, an employer must, at a minimum, consult with the employee before making the deduction. His Honour noted that without such a safeguard, the protection intended to be afforded by the Wages Protection Act 1983 would be illusory.

[21] There is no dispute that Mr Kalera initially provided his consent to deductions being made from his wages. Consent was provided in both Mr Kalera's IEA and the company vehicle policy. However, a worker may vary or withdraw a consent given for the making of deductions from that worker's wages by giving the employer written notice to that effect.[2]

[22] In the present case I find the deductions made by Simply Security from Mr Kalera's wages were unlawful and breached s 4 of the Wages Protection Act.

[23] Mr Kalera clearly and unequivocally withdrew his consent to deductions being made from his salary prior to the deductions commencing. He did this in writing to Simply Security through his email of 11 April 2017 where he advised *"I have not agreed for any deductions. I had very specifically told that this amount is too high and I dont (sic) agree with the said amount*" and later in that same email "*I am again stating very clearly that I don't agree with the deductions*". He reiterated that he did not consent to the deductions in his email of 21 April 2017 where he asked Simply Security to *"reimburse all the deductions made without my consent*."

[24] In addition, the deductions which were made from Mr Kalera's salary were unreasonable. Simply Security did not consult with Mr Kalera over the level of the deductions to be made from his wages and only provided him with less than 1 day's notice of the first deduction. Furthermore:

(a) Mr Kalera was paid an hourly rate of $15.75 per hour. The level of the deductions on 12, 19 and 26 April, 3 and 17 May represented approximately 25% of Mr Kalera's wages, the two payments on 10

[1] [2013] NZEmpC 200 at [62]
[2] Section 5(2) Wages Protection Act 1983

May 2017 represented approximately 50% of his wages and the final deduction on 24 May included all of his final pay and holiday pay.

(b) The deductions for the accident on 23 March 2017 conflicted with the notification provided to Mr Kalera on 3 May 2017. Mr Kalera was told a deduction of $138 would be made from his wages and this would continue until it was paid. However, the sum deducted on 10 May 2017 and 17 May 2017 was for $139.15.

[25] Simply Security must repay the deductions it made from Mr Kalera's salary without deduction or any further delay. Simply Security is ordered to make payment to Mr Kalera the sum of $1,773.67 within 14 days of this determination.

Issue Two: Did Mr Kalera breach the individual employment agreement?

[26] Simply Security submits Mr Kalera breached the terms of his employment with it by failing to comply with the terms set out in its Company Vehicle Policy. It says he did this by failing to pay the sum of $307.83 for outstanding vehicle repairs. This sum represents the difference between the amount Simply Security deducted from Mr Kalera's wages and the alleged cost of repairing the damage caused in the two accidents. Alternatively, if the Authority were to find the deductions it made to his salary were unlawful, Simply Security submits he breached the terms of his employment by failing to pay the sum of $2,081.50 being the cost of the repairs.

[27] For Mr Kalera to have breached Clause 7 of the Company Vehicle Policy Simply Security must establish that Mr Kalera was at fault for the accidents, the quantum it paid to carry out the repairs, and establish that payment has not been made. In relation to the last element, as the policy is silent on when payment for costs of repair must be made, it is implied that payment must be made within a reasonable time following demand.

[28] Looking at the first of these elements I am satisfied, on balance that, a fair and reasonable employer could have reached the view that Mr Kalera was at fault for the accidents which occurred. Mr Kalera admitted that he was responsible for the damage done to the company vehicle on 13 March 2017. In relation to the second accident, there was an eye witness who gave a statement that Mr Kalera had "crashed" the company vehicle into the civilian vehicle. In addition, the damage on the civilian

vehicle aligned with the bumper of the company vehicle and the owner of the civilian vehicle claimed that the vehicle had not been damaged when she left it.

[29] As to the second element, there is currently insufficient evidence before me to establish that Simply Security has incurred any costs in relation to the first accident. Simply Security provided the Authority with a four line, undated, handwritten, quotation. It has provided no evidence that it has paid this sum. The only evidence of payment for costs of repair relate to the second accident on the 23rd of March. Simply Security has produced evidence showing it paid the sum of $1,391.50 for the costs of repair on 12 April 2017.

[30] In the absence of evidence that Simply Security has incurred costs of repair equating to more than $1,391.50, and taking into account that Simply Security currently holds more than this sum on account of Mr Kalera for the unlawful deductions made from his wages, I find there has presently been no breach of Mr Kalera's terms of employment. This may change following demand being made by Simply Security but I make no finding in that regard.

Costs

[31] Mr Kalera was not represented and therefore does not claim legal costs. However, he is entitled to be reimbursed the fee of $71.56 which he paid to lodge his application in the Authority.

[32] I order Simply Security to pay the sum of $71.56 within 14 days of the date of this determination.

Jenni Trotman
Member of the Employment Relations Authority