



[3] The meeting went on to discuss a number of performance lapses on the part of Mr Campbell while on duty at the Christchurch Polytech site. Mr Campbell accepted that he had received a verbal warning in relation to performance lapses previously, and essentially accepted he was at fault. The meeting closed with Mr McDowall advising he was sending the minutes of the meeting to the HR Manager and that a decision on action would be made. He made it clear by asking Mr Campbell *do you understand that you may be dismissed for this?*. To which Mr Campbell replied *yes I do*. Mr McDowall closed the meeting indicating he would telephone the complainant later that evening or on the following day.

[4] Mr Campbell was dismissed the following day and appears to have accepted that his dismissal was justified. The matter may very well have ended there but for the respondent making deductions from the complainant's holiday pay, one of which related to a first aid course he had undertaken and the remainder to *defray costs of hiring his replacement*.

[5] Mr Campbell accepts the legitimacy of the deduction in relation to the first aid course, but does not accept the second deduction was lawful.

[6] In a statement of problem filed on behalf of the complainant, Mrs Lines set out the calculation of the annual holiday owed in accordance with s.23 Holidays Act 2003 and its amendments, as follows:

•	<i>Total gross earned by Kenneth Craig Campbell</i>	\$9,605.60	
•			
•	<i>Annual holiday pay payable on that amount @ 8%</i>	\$768.44	<i>gross</i>
•	<i>Less PAYE</i>	\$149.14	
		<hr/>	
		\$ 619.30	<i>net</i>
•	<i>Minus Kiwisaver deduction</i>	\$30.72	
		<hr/>	
•	<i>Net annual holiday pay owed to Mr Campbell</i>	\$ 588.58	<i>net</i>
•	<i>Minus value of first aid course</i>	101.25	
		<hr/>	
•	<i>Net annual holiday pay owing</i>	<u>\$ 487.33</u>	

[7] On 12 December 2008 Mrs Lines emailed this calculation to Mr Black together with a request for payment in the sum of \$487.33.

[8] In reply to that, Mr Black asked that all future correspondence be by written letter only and further submitted that clauses 1.1, 2.1 and 2.2 of the Employment Agreement was justification for the non-payment of holiday pay.

[9] The relevant clauses read:

*1.1 In the event that the employee leaves without notice or during the notice period without the written consent of the employer, the employee shall pay to the employer the relevant daily pay for each day not worked during the notice period. The employee agrees that such a sum may be deducted from the employee's pay including holiday pay.*

*2.1 The employer may dismiss the employee with or without notice or payment in lieu of notice for cause. This includes but is not limited to the employee not being able to undertake all the duties of the position for any reason, behaviour or performance concern that warrant dismissal, and for breach of any of the employee's undertakings.*

*2.2 If the employee is absent from work without notice and is unable to be contacted by the employer for one continuous working days, the employee shall be deemed to have abandoned and terminate his employment unless acceptable reason for the absence can be given.*

[10] Mr Black's email letter closes with the following statement:

*The employee has confirmed 2.2 thus giving rise to 1.1. We are thus within our legal rights to deduct and in fact bill this former employee accordingly.*

### **Discussion and analysis**

[11] This claim has nothing to do with payment of notice or time in lieu of notice. The matter arises simply from a disciplinary action taken by the respondent against the complainant, who has not challenged the legitimacy of the dismissal.

[12] The minutes of the meeting on 11 November 2008 do not in any way address the issue of abandonment and the employer is unable to rely on that ground in terms of the deductions from Mr Campbell's holiday pay. It is quite clear from the minutes of the meeting that Mr Campbell did not leave his employment without notice or during a notice period and the respondent's attempt to cite this as a ground for deduction was without lawful foundation.

[13] The Authority does not accept that no notice of the absence from his shift on 10 November 2008 was communicated to his immediate supervisor and manager. It is accepted that the company's directive to the complainant was that this was not an appropriate method to notify of an absence. But, notwithstanding that, the employer was advised by Mr Campbell of his absence.

**Determination**

[14] The Authority accepts the legitimacy of the deduction of \$101.25 as reimbursement to the employer of the value of the first aid course attended by Mr Campbell.

[15] I find on the evidence before the Authority that Mr Campbell is owed the sum of \$487.33 net which sum I order the respondent to pay to Mr Campbell.

[16] I also order the respondent to pay \$70 as a refund of the filing fee Mr Campbell incurred in bringing this matter before the Authority.

[17] The payments are to be made by a cheque issued in favour of Mr Campbell and to be sent to Mrs Lines within ten working days of the date of issue of this determination.

Paul Montgomery  
Member of the Employment Relations Authority