

BETWEEN      JON PIERRE NARBHEY  
                         Applicant

AND              FIRE      SECURITY      SERVICES  
                         (AUCKLAND) LIMITED  
                         Respondent

Member of Authority:      Leon Robinson

Representatives:              Anne-Marie McNally for Applicant  
   Glenys Steele for Respondent

Investigation Meeting:      09 October 2008

Determination:                02 April 2009

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**DETERMINATION OF THE AUTHORITY**

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**The problem**

[1]      Mr Jon Pierre Narbey (“Mr Narbey”) seeks to recover wages he says was unlawfully deducted from his final wages together with interest. He asks the Authority to determine that his former employer Fire Security Services (Auckland) Limited (“FSSL”) has acted in breach of the Wages Protection Act 1983 and/or the applicable collective employment agreement by making an unauthorised deduction from his final pay. He asks the Authority to order FSSL reimburse him the whole of the alleged unauthorised deduction in the sum of \$1,804.23.

[2]      The parties were unable to resolve the differences between them by the use of mediation.

**The facts**

[3]      Mr Narbey commenced employment with FSSL on 24 November 2005. He was employed as a Fire Alarm Tester. The terms of Mr Narbey’s employment were recorded in a written individual employment agreement (“the IEA”).

[4] Mr Narbey also signed a "Training Agreement" at the commencement of his employment. The Training Agreement included these terms:-

*2. That [FSSL] will pay the training course fees for this year to the value of \$968.29, which it shall be entitled to deduct from my wages at the amount of \$25.00 per week until repaid in full. I will be entitled to have the training course fees reimbursed by [FSSL] when this training course has been completed.*

*3. That [FSSL] incurs costs, beyond the training course fees, in association with this training that it will be entitled to recover from me in the specified circumstances. I acknowledge that that such is the investment in this training by [FSSL] that it is entitled to expect that I remain employed by [FSSL] for a period of not less than 12 months after I have completed the training.*

*The specified circumstances in which [FSSL] will be entitled to recover the agreed cost of the training will be:*

*3.1 I resign/terminate my employment during the training; or*

*3.2 I resign/terminate my employment within 12 months of completing the training; or*

*3.3 I fail to use my best endeavours without reasonable excuse to complete the training within the expected timeframe; or*

*3.4 I abandon the training without reasonable excuse.*

*4. The agreed cost of the training for the purposes of this Agreement will be \$4,000.00, whether the training takes one, two, three or more years to complete.*

*5. Where I resign/terminate my employment during the training/[FSSL] will be entitled to recover the agreed cost of the training entirely. This clause will not apply if compassionate grounds exist and [FSSL] waives the right to recover.*

*6. Where I resign/terminate my employment during the 12-month after the completion of the training, [FSSL] will be entitled to recover the agreed cost of the training on a pro-rated basis at the rate of \$81.63 per week or part thereof. This clause will not apply if compassionate grounds exist and [FSSL] waives the right to recover.*

[5] Mr Narbey says he did not agree with clause 4 and he protested. He said he capitulated however when FSSL regional manager Mr Ron Green ("Mr Green") told him he would not have a job if he did not agree to the clause.

[6] The FSSL collective employment agreement came into force on 19 February 2007. That collective contained these provisions:-

*29.1 The employee will be required to complete the NZQA Fire Tech Training course, in accordance with the Training Policy in the House Rules.*

*29.2 When undertaking the NZQA Fire Tech course, the employees agrees to the terms of the training agreement as part of their employment terms and conditions.*

[7] Mr Narbey was advised in writing by letter dated 4 April 2007 that he had "completed all the Firetech requirements of [his] qualification".

[8] On 10 December 2007 Mr Narbey gave written notice to FSSL of his resignation from the employment. He wrote "I also withdraw your Authority for any deductions to be made by Fire Security from any wages and holiday pay owed to you".

[9] Mr Green wrote this letter dated 16 January 2008:-

*On 10 December 2007 we received your resignation. You also stated in your resignation "I also withdraw your authority for any deductions to be made by Fire Security from any wages and holiday pay owed to you".*

*In accordance with clause 16 of the Wages Protection Act it states that "nothing in this Act derogates from or makes it unlawful to comply with - (a) any provision of any collective employment contract". On that basis and given the whole training agreement forms part of the collective we are complying with the collective agreement.*

*In addition to the above we don't believe one party can change the terms of an employment agreement without the agreement of the other party.*

*As you are aware you signed a training agreement on 24 November 2005 (copy attached) which under clause 6 of the agreement states "Where I resign/terminate my employment during the 12-month after completion of the training, Fire Security Services Limited will be entitled to recover the agreed cost of the training on a pro-rata basis at the rate of \$81.63 per week or (sic)thereof." The training agreement is endorsed under clause 29 of the "Fire Security Services Ltd Collective Agreement 2007-2009".*

*As you were awarded your Level 3 NZQA in June 2007 and resigned on 10 December with 20 days notice we are exercising our right under clause 6 of the training agreement to deduct \$81.63 per week for 21 weeks which amounts to \$1714.23.*

[10] By letter dated 7 February 2008 Mr Narbey's union wrote to FSSL protesting the deductions made from Mr Narbey's wages and giving notice of its intention to seek repayment by compliance order and a penalty.

### **The merits**

[11] Mr Narbey says FSSL is indebted to him for the total sum deducted without his consent from his final pay.

[12] FSSL maintains that because the training agreement formed part of the collective agreement, Mr Narbey could not withdraw his agreement to deductions from his pay. Mr Green says that section 16 of the Wages Protection Act 1983 makes it clear that any withdrawing of authority by the employee may not be done if it derogates from any provision of the collective agreement. Mr Green says Mr Narbey having reaped the benefits now seeks to avoid his responsibilities.

[13] Section 16 provides that subject to section 6(2), it is lawful to comply with a provision of a collective employment contract which may be inconsistent with the provisions of the Wages Protection Act 1983.

[14] I consider that the training agreement is a unilateral agreement. It has only one party, that is, Mr Narbey. The document is not executed as a bilateral agreement between both parties.

[15] The training agreement is said to become part of the employee's terms and conditions of employment. That may be so, but that says nothing about the revocation of an authority to deduct. I consider the right of authorisation to make deductions is unfettered and the employee is free to revoke any such authority at any time.

[16] Liability to pay and authority to deduct are two very different things and they should not be confused. While an authority to deduct may be revoked, any liability to pay remains unaffected.

[17] I am not persuaded that Mr Narbey's authorisation for deductions from his wages was irrevocable. He was free to revoke any authorisation he gave at any time. I do not agree that contractually whether by the terms of the IEA, collective or the Wages Protection Act 1983 itself, he was bound not to ever revoke his authorisation. For the avoidance of doubt, I do not agree that section 16 has such an effect.

[18] FSSL was not authorised to make deductions for the manual. It made such a deduction unlawfully.

**The determination**

[19] For the reasons set out above, I determine that FSSL unlawfully deducted the sum of \$1,804.23 from Mr Narbey's wages because its previous authority to make such a deduction had been revoked. **I order Fire Security Services (Auckland) Limited to repay to Jon Pierre Narbey the sum of \$1,804.23.**

[20] As Mr Narbey has stood out of this sum since it was deducted he shall have interest on it. **I order Fire Security Services (Auckland) Limited to pay interest to Jon Pierre Narbey on the sum of \$1,804.23 at the rate of 5% per annum from 16 January 2008 until the date of payment.**

[21] I am not persuaded that the circumstances of this case require the imposition of a penalty. I therefore decline to exercise my discretion to impose a penalty.

**Costs**

[22] In the event that costs are sought, I invite the parties to resolve the matter between them, but failing agreement, Ms McNally is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Ms Steele is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe without leave.

Leon Robinson

**Member of Employment Relations Authority**