

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2018] NZERA Christchurch 143
3022696

BETWEEN DEAN PATON
 Applicant

AND CONSTEEL LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Matt Jones, for Applicant
 Tiffany McRae, for Respondent

Investigation Meeting: 30 & 31 July 2018 at Christchurch, with the applicant and other
 witnesses attending by videoconference.

Submissions received: 17 August and 25 September 2018 from Applicant
 11 September 2018 from Respondent

Determination: 9 October 2018

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

- A. For the reasons set out in this determination, Mr Paton was not unjustifiably constructively dismissed, did not suffer unjustified disadvantage in his employment and did not have wages unlawfully deducted. He also did not have holiday pay unlawfully deducted.**
- B. The Authority does not have the jurisdiction to order Mr Paton to pay the balance owed by him in respect of the uninsured costs arising from the vehicle crash, and the respondent suffered no evident financial loss in respect of Mr Paton not giving one week's notice of his resignation.**

C. Mr Paton is ordered to pay to the respondent the sum of \$100 in respect of an advance of salary made to him.

D. Costs are reserved.

Employment relationship problem

[1] Mr Paton claims unjustified constructive dismissal, unjustified disadvantage in his employment together with recovery of arrears of wages of \$2,000 that he says were unlawfully deducted. He also claims that holiday pay in the sum of \$1,000 was unlawfully deducted.

[2] The respondent denies that Mr Paton was unjustifiably dismissed, saying that he abandoned his employment. It also denies that he suffered unjustified disadvantage in his employment and asserts that deductions from Mr Paton's wages were lawful. The respondent also counterclaims against Mr Paton in respect of sums it says are owed by him, and for failing to give notice of termination.

Material events leading to these proceedings

[3] The respondent operates a steel fixing business, providing reinforced steel placement services to civil, commercial and residential markets throughout the South Island of New Zealand. Mr Paton, who is a citizen of Ireland, was employed on a working holiday maker basis as a steel fixer pursuant to the terms of a written employment agreement dated 13 March 2017. Mr Paton was aged 18 at the time of his employment, and is the nephew of a friend of Damien and Joyce Gahan, the shareholders of the respondent. Mrs Gahan is also now the sole director of the respondent although, at the material time, Mr Gahan was the sole director.

The writing off of the company vehicle

[4] The precipitating event that eventually led to the breakdown in the relationship between Mr Paton and Mr and Mrs Gahan occurred in the small hours of Thursday 22 June 2017 when a vehicle owned by the respondent was crashed into a tree in Arrowtown, causing extensive damage to the vehicle and injury to the occupants. The vehicle was being driven by

a friend of Mr Paton (Ryan Fay). Mr Paton and another employee of the respondent with whom Mr Paton was living, Daniel Hunnag, were passengers in the vehicle. Mr Fay was arrested for driving while intoxicated. Mr Paton suffered a minor injury to his head and/or ear, and Mr Hunnag broke his leg.

[5] The vehicle in question had been left at the address where Mr Paton and Mr Hunnag were staying in Cromwell. Neither Mr Paton nor Mr Hunnag had driving licences. Mrs Gahan says that she had given permission to Mr Paton and Mr Hunnag to use the vehicle only for the purposes of them taking their driving tests and to collect coal to heat the staff house, but there is a conflict between the parties as to whether that permission extended to Mr Paton and Mr Hunnag being allowed to drive the vehicle on other occasions. In any event, Mr Paton was not legally permitted to drive as he had no valid driving licence of any description.

[6] There is also a conflict of evidence between the parties as to the exact circumstances of how the vehicle came to be in Arrowtown before it was damaged, and how Mr Fay came to be driving it. Mr Paton's evidence in this regard is inconsistent as between his statement of problem and his brief of evidence. The former says that he drove to Arrowtown for a drink after work. In his brief of evidence, he says that he and Mr Hunnag were driving back from Queenstown after having tried (unsuccessfully) to take their driving tests on 21 June, and had stopped off in Arrowtown for a drink with Mr Fay and Mr Paton's uncle. Mr Paton repeated this version of events to the Authority during his oral evidence, but it is not supported by wage and time records, which show that he worked until 4.30 pm on 21 June. However, other evidence suggests that the wage and time records for that period were not necessarily accurate in any event.

[7] Apart from bringing into question Mr Paton's credibility, this conflict does not need to be resolved by the Authority because Mr Paton was not disciplined for the incident. The key point is that the vehicle was a write off, and the respondent was unable to claim for the accident under its insurance policy due to the fact that Mr Fay, the driver, was intoxicated.

The respondent owed a total of \$17,439.09 to the vehicle financing company and the towing company.

The sharing of responsibility for the cost of the crash

[8] Although he denied it at the Authority's investigation meeting, I am satisfied that, shortly after the accident, Mr Paton accepted that he shared responsibility with Mr Fay for writing off the vehicle, and that he should therefore share the cost with him. I accept this, first, because of a text exchange between him and Mr Fay which the Authority saw, as follows:

Mr Fay: Just said he disappointed in the both of us and that you should never of had the truck and that you said you would pay halves with me cause we both to blame.

Mr Paton: Yeah damo [Mr Gahan] said the truck has to be paid for and the first thing I said was well your not giving ryan the bill I'm in this as well.

Mr Fay: yea that's what he said..works out at like 9gs

Mr Paton: 9 grand each

Mr Fay: yeah...don't know we're I'm gonna get that from

Mr Paton: yeah same bro sure I'm suspended from work so

Mr Fay: yeah Damo was saying he doesn't know what Joyce us gonna do with Ye..I'll just have to try get a lend from home.

[9] I am also satisfied that Mr Paton agreed to share the cost because he said in his oral evidence that he was the last person to have the car keys before Mr Fay drove the car drunk and crashed it. He must therefore have given the keys to Mr Fay and he knew this, and that he therefore shared responsibility. A newspaper report of the accident put before the Authority stated that Mr Fay was almost four times over the legal blood alcohol driving limit at the time of the accident (which was not disputed by Mr Paton) and so it should have been obvious to Mr Paton that Mr Fay was in no fit state to drive.

[10] I am also satisfied that Mr Paton came to an agreement with Mr and Mrs Gahan that responsibility for paying the sum owed would be shared between him and Mr Fay, and that Mr Paton agreed that he would reimburse the respondent half of the sum owing. In discussing this at the time the parties appear to have referred to the half share as \$9,000, although a half share more properly came to \$8,719.55.

[11] It appears that there were discussions between Mr Paton, Mr Gahan and Mrs Gahan over a period of weeks as to how Mr Paton would repay his share of the money owed. At the suggestion, or insistence of Mrs Gahan, Mr Paton tried to get a bank loan which was refused, and Mr Paton also contacted his father in Ireland asking for the money. This latter avenue was also unsuccessful.

[12] I am satisfied that Mr Paton and Mrs Gahan eventually agreed that he would pay the money owed by way of deductions from his wages at the rate of \$1,000 per fortnight, and that Mrs Gahan would set up an arrangement so that the money would go directly to the car financing company.

The bullying allegations and the deductions from wages and holiday pay

[13] Part of Mr Paton's complaint is that his interactions with Mr and Mrs Gahan discussing how he would pay the half share amounted to bullying of him. Mr Paton stated the following in his statement of problem:

Damian Gahan came to see me late at night the day of my release¹ at a mutual friend's house. He was very angry and intimidating and also accused me of stealing the truck which I was shocked by. Obviously I was happy to assume some responsibility for what happened and should have done what I could to stop Ryan from driving. He demanded the half the money (9k) of the truck off me by 19th July as he had agreed the other half with the driver of the vehicle. 18k total. He told me to call relations back in Ireland to get the money or rob a bank if I had to.

Joyce Gahan rang both my Mother and Father separately threatening to bring them to court and having my visa revoked if they didn't pay the money. My parents haven't got access to that kind of money and as a result of the realisation that no money was coming the intimidation and threatening

¹ From hospital.

behaviour increased on numerous occasions with Damian Gahan telling me at one stage that he would kick the shite out of me.

I felt very vulnerable at this time and was genuinely afraid of going to work every day. Without any written or verbal consent, ConSteel decided to recover \$1000 dollars every 2 weeks from me leaving me with approx \$127 to survive on. I explained to Joyce I couldn't make it through on that amount of money but yet they kept taking it. They also confiscated my holiday pay which was around \$1000.

[14] In his written brief of evidence Mr Paton expanded a little on the allegations of bullying as follows:

After a couple of weeks back at work Joyce Gahan told me she wanted the money for the truck, she became aggressive, confronting and I felt intimidated and bullied. Joyce wanted me to contact family and get the money.

On 28 July Joyce Gahan told me to ring the bank and ask for a loan of \$9000. She asked me to lie and defraud the bank and tell them the money was for a bond and vehicle for work. I felt bullied, so I did ring the bank to see if I could get a loan, but this was not possible.

...

On one occasion I said I couldn't afford to start the payments as I had to pay rent and living costs and she said, "Ok, I'll just take it from your holiday pay". And she did, she took \$1000.

[15] The respondent denies these allegations of bullying and/or threatening conduct towards Mr Paton. Mrs Gahan said in her evidence that no mention was made of his visa, or of court, and that Mr Paton continued to work happily with the respondent, even helping the Gahans to move furniture at one point.

[16] Mrs Gahan says that, on 30 July 2017, it was Mr Paton who called her to explain that the only way he could pay his half of the money was by instalments and that he wanted the payments to be finished before Christmas because he wanted to get a loan to buy a car. She says that she asked Mr Paton to put his thoughts down on paper and let her know how much he wanted to pay back but that, although he agreed, he never did this.

[17] Mrs Gahan says that, on the next payday, Mr Paton noticed that no money had been taken and called her again whereupon she explained that she needed something in writing to give to the payroll provider. Mr Paton asked her to write to him what was needed and said that he wanted \$500 to be taken out each week. Mrs Gahan says that she contacted the

payroll agency and set up deductions for Mr Paton but forgot to put the request in writing for Mr Paton to sign.

[18] Mrs Gahan says that, when the first deduction was due on 14 August 2017, Mr Paton contacted her to ask if it could be deferred to the next pay period as he needed to pay for something. Mrs Gahan suggested that they could use his holiday pay for the first payment, to which Mr Paton texted “okay”. Mrs Gahan explained that, to allow the use of Mr Paton’s holiday pay, his employment was terminated and then reinstated in the payroll system. This was at the suggestion of the payroll provider. Therefore, in the pay period ending 13 August 2017, the net sum of \$1,292.94 was paid to Mr Paton. The Authority saw a copy of the text exchange between Mr Paton and Mrs Gahan on Sunday 13 August which was as follows:

Mr Paton: Hi Joyce I was thinking could I start with the truck next pay cause I’ve to pay for this place I’m staying in and a few other things.

Mrs Gahan: 👍 Ok, I’ll just transfer your holiday pay because they are expecting the payment. The money is going straight to turners.

Mr Paton: Okay, what’s the plan for tomorrow

[19] In the following pay period, ending 27 August 2017, \$1,000 was deducted and Mr Paton was left with the net sum of \$578.58. The final deduction of \$1,000 was made in the pay period ending 10 September 2017. On that occasion he was left with \$127.71 net.

[20] Mrs Gahan said that the very low wages on 10 September were due to the number of days’ work that Mr Paton had missed during that pay period. She says that, if he had worked his normal hours during that pay period, he would have had nearly \$600 after tax. She also says that she was not aware at the time what pay he was going to receive as she did not personally handle the pay of the employees.

Mr Paton starts missing days of work

[21] According to Mr Paton’s brief of evidence, on 1 September 2017 he “felt threaten[ed], pressured and scared and [chose] not to continue working for ConSteel, so moved into a friend’s house in Methven, Eric Collins”.

[22] However, Mrs Gahan says that Mr Paton had been working between Ashburton and Otago since 13 August for nearly four weeks before he started missing days of work. Mrs Gahan says that Mr Paton missed Monday 28 August, Monday 4 and Tuesday 5 September and again, Monday 11 September.

[23] On 11 September Mr Paton texted Mrs Gahan and apologised for missing his lift to Ashburton (where they were working that day) because he had fallen asleep without switching his alarm on. Mrs Gahan's response shows that Mr Paton was clearly expected in Ashburton, and that he was to get in as soon as possible. Later on the same day, Mr Paton texted Mrs Gahan to ask if he could get his full pay that day (as it was pay day) and Mrs Gahan replied saying that she could not change it as a direct debit going directly from the bank to MTF, the car financing company. He replied "OK".

[24] Mrs Gahan says that she then made contact with Mr Paton's uncle to express her concerns about Mr Paton spending too much time in the pub in Methven. She says that the uncle asked her to bring Mr Paton back to Otago so that he could keep an eye on him. Mrs Gahan says she was unable to make contact directly with Mr Paton and so she then asked a mutual friend to check up on him and to tell him that there was work in Queenstown for him so that he could stay with his uncle (who lived in Arrowtown).

The ending of the employment

[25] This mutual friend visited Mr Paton on or around 12 September and reported back to Mrs Gahan that Mr Paton had heard in the pub that ConSteel had only paid \$13,000 for the vehicle and that they were therefore trying to "con money out of him". The friend also told Mrs Gahan that Mr Paton had a new job and was not working for ConSteel anymore. In his oral evidence Mr Paton confirmed that he had found a new job by that point, with a seed company, but had not yet started it.

[26] Two days later Mr Paton contacted Mrs Gahan to say that he was being told different stories and he did not know what to do. Mrs Gahan says that "at this stage I just gave up. It seemed like he was surrounded by people who were giving him bad advice".

[27] A lot of evidence was given by the parties about a visit made by Mr Gahan on Saturday 16 September to Mr Paton at the farm house he was staying in in Methven, during which, according to Mr Paton, he was forced by Mr Gahan to go back with him to the respondent's staff house in Cromwell, with the aim of starting work for the respondent again. The respondent's evidence is that Mr Paton was not forced, and that he had asked for his job back after speaking to his uncle. It is agreed, though, that Mr Paton vacated the staff house early the following morning without telling the Gahans, and travelled back to Methven by bus.

[28] However, on Mr Paton's own case, he had stopped working for the respondent by 12 September, and so whatever actions were taken on 16 September cannot come within the jurisdiction of the Authority. I shall therefore not set out here the detailed evidence that was given, nor decide between the two versions of events.

[29] Although there was some further text communications between Mrs Gahan and Mr Paton in the week commencing 18 September, I am satisfied that the employment relationship had ended by then. The next time that Mrs Gahan heard from Mr Paton, she says, was when she was contacted by a friend of Mr Paton to say that he was going to be taking proceedings against the company.

Issues

[30] The following issues need to be determined by the Authority:

- (i) Whether Mr Paton was unjustifiably dismissed (constructively or otherwise)?
- (ii) Whether Mr Paton suffered unjustified disadvantage in his employment?
- (iii) Whether unlawful deductions were made from Mr Paton's pay, including with respect to his holiday pay?
- (iv) Whether Mr Paton can be ordered to pay to the respondent the sum of \$5,631.17 in relation to the balance of the sum agreed to be paid in respect of the damaged vehicle?

- (v) Whether Mr Paton should be ordered to pay to the respondent the sum of \$100 being an advance on Mr Paton's salary which was given on 7 September 2017 but which was not earned?
- (vi) Whether Mr Paton should be ordered to pay to the respondent the sum of \$760, being a payment sought by the respondent following Mr Paton's failure to give notice of his resignation.

Was Mr Paton unjustifiably dismissed?

[31] Before embarking on an examination of the evidence, it is helpful to briefly review the relevant law in respect to constructive dismissal. In *Auckland Shop Employees Union v Woolworths (NZ) Limited*² the Court of Appeal enunciated three non-exhaustive categories of constructive dismissal:

1. Where the employee is given a choice of resignation or dismissal;
2. Where the employer has followed a course of conduct with a deliberate and common purpose of coercing an employee to resign; and
3. Where a breach of duty by the employer leads a worker to resign.

[32] Mr Paton says that he is relying on the third category.

[33] The Court of Appeal in *Auckland Electric Power Board v Auckland Provincial District Local Authorities Offices IUOW Inc*³ set out at [419] the approach to be taken when an employee argues that there has been a breach of duty by the employer that led him or her to resign. The Court of Appeal stated:

In such a case as this we consider that the first relevant question is whether the resignation has been caused by a breach of duty on the part of the employer. To determine that question all the circumstances of the resignation have to be examined, not merely of course the terms of the notice or communication whereby the employee has tendered the resignation. If that question of causation is answered in the affirmative, the next question is whether the breach of duty by the employer was of sufficient seriousness to make it reasonably foreseeable by the employer that the employee would not be prepared to work under the conditions prevailing: in other words, whether

² [1985] 2 NZLR 372 (CA) at 374 – 375.

³ [1994] 2 NZLR 415.

a substantial risk of resignation was reasonably foreseeable, having regard to the seriousness of the breach.

Was there a breach of duty by the respondent which justified Mr Paton resigning?

[34] Before answering this, it is necessary to look at the way the employment ended, as Mr Paton did not resign in the conventional way. That is to say, Mr Paton did not communicate expressly that he wished to leave the employment of the respondent. He simply absented himself from work with effect from 12 September 2017 without directly explaining to the respondent why.

[35] A resignation essentially is the termination of employment relationship at the initiative of the employee. Whilst the conventional method of effecting that termination is for the employee to state his or her intention to bring the employment to an end, either in writing or orally, a resignation can also be signalled by the employee's actions. The fact that Mr Paton ceased attending work and did not communicate with his employer signals an intention to terminate the employment.

[36] There is an abandonment clause in the employment agreement which states the following:

Abandonment of Employment

In the event that the Employee has been absent from work for three consecutive working days without any notification to the Employer, this agreement shall automatically terminate at noon of the third day without the need for notice of termination of employment.

[37] Even if Mr Paton's employment did terminate under the terms of the employment agreement by way of abandonment, that is still a termination at the initiative of the employee, and is capable of constituting a resignation. I refer to *Cross v Onerahi Hotel Ltd*⁴ in which the then Judge Inglis observed that "in such circumstances [of an abandonment], the employee has essentially unilaterally terminated the employment agreement"⁵.

[38] Therefore, I am satisfied that Mr Paton's actions amounted to a resignation.

⁴ [2014] NZEmpC 26, (2014) 11 NZELR 467.

⁵ at [32].

[39] As to whether he was justified in leaving the employment of the respondent because of its alleged actions in breach of duty, there is a significant conflict of evidence between the parties.

[40] It must be said that there were some significant credibility gaps in Mr Paton's evidence. These include the following:

- a. Mr Paton implying that he had never agreed to share responsibility for repaying the \$18,000 damage with the third party driver when there is clear evidence from the text exchange with Mr Fay that he did.
- b. Mr Paton suggesting that he did not agree to the use of his holiday pay to go towards the repayment when there was a text showing that he said "okay" to Mrs Gahan's text saying that that was her intention.
- c. Mr Paton saying he was "genuinely afraid of going to work every day" when there are multiple texts between him and Mrs Gahan over several weeks after the accident, both before and after the deductions began, which indicate that they had a normal, relaxed and friendly relationship, discussing everyday topics related to life and work in New Zealand. There is no hint of any intimidation from Mrs Gahan, or of fear or caution from Mr Paton.
- d. Mr Paton stating that he ceased working for the respondent on 1 September 2017 when there is clear evidence that he worked beyond that date, and showed an intention of doing so up to and including 11 September.
- e. Mr Paton saying in his brief of evidence that he had to return to Ireland "because of this incident [of Mr Gahan taking him back to Cromwell on 16 September] and because I was concerned for my wellbeing" when he clearly stayed in New Zealand for several weeks after that date, and only returned to Ireland after his visa expired, as he admitted in his oral evidence.

[41] There were also some minor inconsistencies in Mrs Gahan's evidence, mainly in relation to dates, but she always willingly conceded in her oral evidence that she had made an error when these were put to her in cross examination. In general terms, I preferred the

evidence of Mrs Gahan, as it was more detailed and consistent, both internally and by reference to contemporaneous documents.

[42] As Mr Paton's employment must have ended around Tuesday 12 September 2017, it is only the respondent's actions up to that date that can be relevant in deciding whether Mr Paton was constructively dismissed.

[43] When I consider all of the evidence, I am persuaded on a balance of probabilities that Mr Paton left the employment of the respondent because he had changed his mind about paying half of the money owed, possibly because he was hearing inaccurate gossip in Methven about how much was really owed by the respondent company to the car finance company, and because he had received the promise of new work, with a seed company. I am satisfied that Mr Paton did not terminate his employment because of alleged intimidation by Mr or Mrs Gahan. I reach this conclusion because Mr Paton continued working for the respondent for several weeks after the payment plan had been entered into, and for nearly four weeks from the first deduction in the pay period ending 13 August.

[44] I am also satisfied that the actions of Mr and Mrs Gahan in encouraging Mr Paton to find ways of repaying the money did not amount to intimidation. I accept that Mr and Mrs Gahan were probably fairly tenacious in their attempts to get Mr Paton to find the money he had agreed to pay, but the respondent had accepted only half of the cost in the restorative justice process involving Mr Fay in reliance on Mr Paton's agreement to pay the other half. Mr Paton was in New Zealand basically under the informal guardianship of his uncle, and I do not believe that Mr Paton would have suffered intimidation and bullying, as alleged, without having sought his uncle's protection. Indeed, I infer from the evidence that the uncle, who was not called by Mr Paton to give evidence, probably supported the sharing of responsibility for the money owed by Mr Paton. I also note that the Gahans did not want to press criminal charges against Mr Paton for handing the keys of the vehicle over to Mr Fay without authorisation.

[45] The text evidence between Mrs Gahan and Mr Paton show that they had still not come to any fixed arrangement about recovering the money by 27 July, over a month after the accident. The agreement was reached on a date between 30 July when Mr Paton told Mrs Gahan he could not get a bank loan, and 13 August, when he asked for a deferment of the first deduction. The fact that at least five weeks went by before the repayment agreement was reached, with friendly texts passing between Mr Paton and Mrs Gahan in the meantime, reinforces my view that Mr Paton entered into the agreement willingly, and that there was no bullying or intimidation of Mr Paton.

[46] I also do not accept that Mr Paton's resignation was reasonably foreseeable in all the circumstances. Mr Paton had been communicating with Mrs Gahan up to the previous day with no hint he was dissatisfied. Even Mrs Gahan saying she could not change the deduction on 11 September in response to Mr Paton's request that she did was replied to by him with "ok", which does not suggest he believed that his employment contract had been repudiated.

[47] Even if the actions of Mr and Mrs Gahan in requiring Mr Paton to find ways of repaying his share of the sum owed did amount to a repudiatory breach of duty, which I do not accept, Mr Paton continued working for ConSteel for the period between the first deduction on 13 August 2017 and 12 September, when he stopped working for the company. He therefore had affirmed any breach by continuing to work, without protest.

[48] In conclusion, I find that Mr Paton was not unjustifiably constructively dismissed from his employment.

Did Mr Paton suffer an unjustified disadvantage in his employment?

[49] Mr Paton relies upon the same alleged actions of the respondent in his disadvantage grievance as he does in his unjustified constructive dismissal grievance. I have already found that Mr Paton did not suffer bullying or intimidation in respect of the steps taken by the respondent to agree the method of payment of the money Mr Paton agreed to pay. These did not amount to unjustified disadvantage in his employment.

[50] The alleged coercion of Mr Paton by Mr Gahan that Mr Paton says occurred on 16 September cannot found a personal grievance as Mr Paton was no longer an employee at that time.

[51] One event that may amount to an unjustified disadvantage in his employment relates to the allegation that Mr Gahan came to visit Mr Paton shortly after his release from hospital and reacted angrily. This was flatly denied by Mr Gahan, and no corroborative evidence was produced by either party. Given the concerns I have had about Mr Paton's credibility, on balance, I prefer the evidence of Mr Gahan.

[52] In any event, it appears that no personal grievance was raised about this alleged action, until more than 90 days afterwards. No personal grievance letter appears to have ever been written, and the first mention of the allegation appears to have been in the statement of problem served on the respondent on 22 November 2017. Assuming the alleged bullying occurred on 23 June 2017, the personal grievance was not therefore raised until 153 days later, or 63 days after the statutory 90 day period for raising a personal grievance. No application has been made to raise it out of time.

[53] In his written submissions Mr Jones said that Mr Paton believed himself to have been suspended without pay immediately after the accident while the respondent decided on his employment status, and that the respondent took two days' annual leave to pay for the time off, without Mr Paton's consent. These allegations were not contained in the statement of problem, nor in Mr Paton's brief of evidence. No application has been made to amend the statement of problem. The problem is that the Authority was not given notice of these additional claims so as to enable it to investigate them during the investigation meeting.

[54] In addition, I note that at the time in question Mr Paton was recovering from the accident, but had not been in the employment of the respondent long enough to have accrued the right to paid sick leave⁶. He would therefore not have had any statutory right to receive sick pay. I cannot conclude whether he agreed to be paid holiday pay instead as I was not

⁶ Pursuant to s 63 of the Holidays Act 2003.

aware of the claim at the time of the investigation meeting, and was unable to ask questions of him.

[55] However, in her written submissions Ms McRae states that Mr Paton was paid sick pay during the time he took off, and that the respondent is prepared to make a payment to compensate him for two days of annual leave that were used. I shall not make any orders about this, but note the statement of intent.

[56] Mr Jones also stated in his submissions that the respondent breached the Health and Safety at Work Act 2015 by exacerbating Mr Paton's stress. Apart from this claim not having been pleaded in the statement of problem, the Authority has no jurisdiction to investigate alleged direct breaches of that enactment.

Were there unlawful deductions from Mr Paton's wages?

[57] Clause 4.4 of the employment agreement provides as follows:

Deductions may be made from the employee's wages for time absent from work due to the employee's unpaid absence, where there has been a previous overpayment in wages due to the employee, or when the employee owes money to the employer.

[58] Section 5 of the Wages Protection Act 1983 provides as follows:

5 Deductions with worker's consent

(1) An employer may, for a lawful purpose, make deductions from wages payable to a worker—

(a) with the written consent of the worker (including consent in a general deductions clause in the worker's employment agreement);
or

(b) on the written request of the worker.

(1A) An employer must not make a specific deduction in accordance with a general deductions clause in a worker's employment agreement without first consulting the worker.

(2) A worker may vary or withdraw a consent given or request made by that worker for the making of deductions from that worker's wages, by giving the employer written notice to that effect; and in that case, that employer shall—

(a) within 2 weeks of receiving that notice, if practicable; and

(b) as soon as is practicable, in every other case,—

cease making or vary, as the case requires, the deductions concerned.

[59] I am satisfied that paragraph 4.4 of the employment agreement (which was signed by Mr Paton) contains a written general deductions clause allowing money to be deducted from Mr Paton's wages when he owed the respondent money, subject to the statutory duty of consultation. I further find that Mr Paton did owe money to his employer in respect of half of the uninsured damage caused to the work vehicle, which Mr Paton agreed to pay.

[60] Finally, I am satisfied that there was consultation with Mr Paton prior to, and in respect of making deductions from his fortnightly pay in order to satisfy that debt. This consultation includes the discussions he and Mrs Gahan had about how he was to pay his share.

[61] Did the text of 11 September from Mr Paton to Mrs Gahan asking if he could be paid in full for that week constitute a variation or withdrawal of his consent to the deductions? I believe that asking a question whether he could get full pay that week did amount to the giving of written notice under s 5(2) of the Wages Protection Act to the effect that he wanted to vary the arrangement. This is because, although couched as a question, it clearly communicated Mr Paton's intention; namely, that he wanted not to have the deduction made for that pay period.

[62] However, Mr Paton made the request after the end of the pay period in question. Section 5(2) imposes a requirement upon the employer to vary the deductions within 2 weeks of receiving the notice, or as soon as practicable in every other case. I infer from Mrs Gahan's response to Mr Paton that she could not change the deduction because, the direct debit going directly from the respondent's bank to the financing company, the payment had

already been made. In other words, Mr Paton did not give his notice of variation sufficiently far in advance for that particular payment to be varied.

[63] Therefore, I am satisfied that the respondent's two deductions of \$1,000 each from Mr Paton's pay were not unlawful deductions from Mr Paton's wages.

Was the deduction of \$1,000 holiday pay a breach of the Holidays Act 2003?

[64] Section 86 of the Holidays Act 2003 provides as follows:

86 Holiday pay and leave pay treated as salary or wages

Holiday pay and leave pay payable by an employer to an employee is—

- (a) to be treated as salary or wages earned by the employee; and
- (b) without limiting paragraph (a), subject to deductions that the employer is required or entitled to make from salaries or wages for the purpose of income tax or any other purpose.

[65] Therefore, for the purposes of the Wages Protection Act 1983 it is permissible to make deductions from holiday pay subject to the provisions of the 1983 Act being adhered to. However, in order for the respondent to rely on the written general deductions clause at clause 4.4 of the employment agreement, it must have consulted with Mr Paton.

[66] I am satisfied that Mr and Mrs Gahan did individually consult with Mr Paton, and agreed with him, about the following:

- a. Sharing responsibility with Mr Fay for the uninsured costs resulting from the crash;
- b. paying half of the uninsured costs to the respondent;
- c. paying half of the uninsured costs by fortnightly deductions of \$1,000 from his wages; and
- d. starting the first deduction on 14 August.

[67] Mr Paton then asked for a variation to the agreement; namely for the deductions to start two weeks' later. Mrs Gahan's text stated she would deduct the \$1,000 a different way, by way of holiday pay. Mr Paton acquiesced to that. Was that consultation about the specific deduction? I believe that it was a consultation about the specific series of deductions of \$1,000 a fortnight. That consultation included the \$1,000 for the pay period ending on 14 August. I do not believe that the fact that Mrs Gahan took the payment out of holiday pay instead of wages means that there was no consultation about the deduction.

[68] Addressing briefly the 'cashing up' provisions of the Holidays Act, at ss 28A to 28F, these provisions do not apply to this situation as they clearly apply only when an employee makes a request to have the employer pay out a portion of the employee's entitlement to annual holidays. That was not the case here. I therefore respectfully disagree with the concession made by Ms McRae in her written submissions that only one week's holiday pay could have been agreed to have been paid out in these particular circumstances.

[69] I therefore find that the deduction of \$1,000 out of Mr Paton's holiday pay was not in breach of the Wage Protection Act or the Holidays Act.

[70] With respect to the methodology adopted by the respondent's payroll provider to enable the respondent to deduct the holiday pay, in accordance with which Mr Paton's employment was terminated and then immediately reinstated, I do not see this as a termination in law, as there was no intention for the employer to cease employing Mr Paton. Rather, it was an administrative fiction to allow the payroll system to deduct the holiday pay. I do not agree that Mrs Gahan invented the existence of the payroll provider, as implied by Mr Jones.

[71] I will add that, during the investigation meeting, it emerged that Mr Paton had been underpaid for his holiday pay as he was contractually entitled to 28 days' annual leave per year. Whilst the contractual clause in question appears to be incomplete, as it does not deal with public holidays, that part of it is unambiguous, and the respondent agrees that Mr Paton was underpaid in respect of his holiday pay. The parties agreed to try to resolve that issue

between themselves. However, if they cannot agree what is owed, an application may be made to the Authority for a determination.

The counterclaims

[72] The respondent counterclaims against Mr Paton in three sums:

- a. The sum of \$5,613.17 in respect of the balance of the sum that Mr Paton agreed to pay in relation to the damaged vehicle;
- b. The sum of \$100, being an advance from Mr Paton's wages advanced on 7 September, but which was not recovered from his final wages; and
- c. The sum of \$380 being payment in lieu of notice, amounting to one week's pay.

The sum of \$5,613.17

[73] I have found that Mr Paton did agree, without any coercion, that he would pay half of the uninsured costs resulting from the writing off of the vehicle. However, it is not the case that all issues that arise between an employer and an employee fall exclusively within the Authority's jurisdiction just because of that relationship. This was made clear by the Court of Appeal in *JP Morgan Chase Bank NA v Robert Lewis*⁷

[74] The Authority has exclusive jurisdiction to make determinations about 'employment relationship problems generally', pursuant to s 161 of the Employment Relations Act 2000 (the Act). Section 161(1)(r) refers to "any other action...arising from or related to the employment relationship ...".

[75] Section 5 of the Act states that an 'employment relationship problem' "includes a personal grievance, a dispute and any other problem relating to or arising out of an employment relationship". The Court of Appeal in *JP Morgan Chase Bank* considered what

⁷ [2015] NZCA 255, at [95].

was meant by the phrase ‘relating to or arising out of’, and concluded that the problem must “..be one that directly and essentially concerns the employment relationship”.⁸

[76] The Court of Appeal distinguished situations where the employment relationship gave the opportunity for the issue to have arisen, such as theft⁹, where an employee’s conduct would make him or her liable without the employment relationship. The Court of Appeal held that such cases do not fall within the jurisdiction of the Authority.

[77] The present case is, in the *JP Morgan Chase Bank* context, of the same nature as a theft in my view. I am satisfied that, whether or not Mr Paton had the authority of Mrs Gahan to drive the respondent’s vehicle on 21 June 2017, he certainly had no authority to give the keys of the vehicle to a drunken third party, and to allow that third party to drive it. That action fell outside of the terms of the employment relationship, just as a theft would. Indeed, unlike an employee who may steal money which she was authorised to handle in the course of her employment, Mr Paton was not even allowed to drive the vehicle as part of his employment, as he had no driving licence of any kind.

[78] Even though the parties reached an agreement for half of the uninsured costs to be paid back via deductions from Mr Paton’s wages, that agreement does not bring the matter under the aegis of the employment relationship in a *JP Morgan Chase Bank* sense. All that the employment relationship did was to present a mechanism for Mr Paton’s reparation to the respondent to be effected.

[79] In view of this, I must conclude that recovery of the balance of the uninsured costs from Mr Paton by the respondent cannot be sought in the Employment Relations Authority, as it does not have the jurisdiction to determine such a matter.

⁸ At [95].

⁹ At [97].

The overpayment of \$100

[80] Mr Paton agreed that he was advanced the sum of \$100. It is clear from the payslips that this was not deducted from his pay before he ceased to be employed. Therefore I accept that the respondent is entitled to recover this sum from Mr Paton.

\$380 in lieu of notice

[81] The employment agreement stipulates at clause 10.1 that the employee is required to give one week's notice of resignation. However, there is no clause in the employment agreement allowing the employer to deduct or seek payment of one week's pay if one week's notice is not given. Furthermore, although Mr Paton breached his employment agreement by not giving one week's notice, the respondent led no evidence to show that it incurred any loss as a result of this breach.

Conclusions

[82] I find that Mr Paton was not unjustifiably dismissed, nor that he suffered an unjustified disadvantage in his employment. I also find that the deductions from his wages and his holiday pay were not unlawful.

[83] I find that the authority does not have the jurisdiction to determine the balance owed by Mr Paton in respect of the uninsured costs arising from the crash, and that the respondent suffered no evident financial loss in respect of Mr Paton not giving one week's notice of his resignation.

[84] I find that Mr Paton owes the respondent \$100 in respect of an advance in pay.

Order

[85] I order Mr Paton to pay to the respondent the sum of \$100 within 14 days of the date of this determination.

Costs

[86] I have found that neither party was materially successful and I am minded to order that costs should lie where they fall. However, if either party disagrees, they are to serve and lodge a memorandum explaining their position, and the costs sought, within 14 days of the date for this determination, and the other party has a further 14 days within which to serve and lodge a memorandum of reply. In such a case, I would then determine the matter of costs on the papers. Accordingly, I reserve costs.

David Appleton
Member of the Employment Relations Authority