

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2017] NZERA Christchurch 141
3000117

BETWEEN JEREMY SAYER
 Applicant

A N D FIVEFIFTEEN HOLDINGS
 LIMITED
 Respondent

Member of Authority: Peter van Keulen

Representatives: Cherilyn Walthew, Advocate for Applicant
 Charlie Arms-Harris, Counsel for Respondent

Investigation Meeting: 16 May 2017 at Alexandra

Submissions Received: 16 May 2017 for Applicant
 16 May 2017 for Respondent

Date of Determination: 16 August 2017

DETERMINATION OF THE AUTHORITY

- A. I decline Jeremy Sayer’s claim for a personal grievance for unjustified dismissal. Fifteefteen Holdings Limited did not dismiss Jeremy Sayer.**
- B. Jeremy Sayer is not entitled to four weeks holiday pay for the period that Fifteefteen Holdings Limited employed him under a fixed-term employment agreement.**
- C. Fifteefteen Holdings Limited cannot deduct any money from the final pay owing to Jeremy Sayer. Therefore, Fifteefteen Holdings Limited must pay Jeremy Sayer \$2,239.00 (gross).**
- D. I reserve costs with a timetable set for submissions if required.**

Employment relationship problem

[1] The applicant, Jeremy Sayer, claims the respondent, Fifteenteen Holdings Limited (Fifteenteen), dismissed him when it refused to allow him to work his notice period. He also claims that Fifteenteen failed to pay him his final pay, which covered two weeks work plus accrued but untaken holiday entitlements as well as payment for work on public holidays that Fifteenteen had not paid. And he claims that Fifteenteen failed to pay him holiday pay it agreed he was entitled to at the commencement of his permanent employment after being on a fixed term employment agreement.

[2] Fifteenteen says Mr Sayer resigned and refused to work his notice period so there is no dismissal. And as a result of Mr Sayer not working his notice period it suffered losses that it correctly deducted from the final payment owed to him. It also says Mr Sayer was paid his holiday pay during the fixed term employment arrangement and there was no entitlement to further holidays at the commencement of the permanent employment.

[3] Prior to my investigation of this matter there was some confusion about Mr Sayer's pleaded claim and, consequently, what I would investigate. In a minute dated 8 May 2017 I notified the parties of the claims I would investigate, being:

- (a) Unjustified dismissal relating to the allegation of dismissal by Fifteenteen during Mr Sayer's notice period, for which Mr Sayer seeks compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000;
- (b) Wage arrears for work carried out by Mr Sayer prior to termination of his employment;
- (c) Wage arrears for the unworked notice period of three weeks;
- (d) Unpaid leave entitlements including four weeks holiday pay carried over from the fixed term employment, accrued but unpaid holiday pay for the employment from 6 January 2016, payment for work on a public holiday on 8 February 2016 and payment for alternative leave on 11 October 2015.

Unjustified dismissal

[4] The first issue for Mr Sayer's unjustified dismissal claim is did Fifteenteen dismiss Mr Sayer?

[5] Then, if Fifteenteen did dismiss Mr Sayer, was the dismissal:

(a) carried out through a fair process, particularly in light of the requirements in ss 4(1A) and 103A of the Employment Relations Act 2000 (the Act); and/or

(b) substantively justified?

Conflicting evidence

[6] The question of whether Fifteenteen dismissed Mr Sayer is primarily answered by a factual analysis.

[7] Mr Sayer says he gave his notice to Grant Constable, the owner and manager of Fifteenteen, and Mr Constable reacted badly to this. What followed was four separate altercations between the two in which Fifteenteen refused to allow Mr Sayer to work out his notice period – he says this amounts to a dismissal.

[8] In contrast, Mr Constable says he was disappointed that Mr Sayer resigned but he wanted him to work his notice period as Fifteenteen had work booked for him to complete. Mr Constable says it was Mr Sayer who became angry, abusive and threatening in the four altercations. And Mr Sayer made it clear that he was not going to work his notice period by various actions including telling him he would not work it, storming off, collecting his tools and returning his uniform.

[9] If Mr Sayer's version of events is correct then there is likely to be a dismissal as the refusal to allow Mr Sayer to work his notice period is a sending away. If Mr Constable's version of events is correct then there will not be a dismissal but rather a resignation taking immediate effect.

[10] In determining what did in fact occur in the relevant period I must resolve the conflict in the evidence, particularly between Mr Sayer and Mr Constable. To do this I have:

- (a) Considered the consistency of each witness's evidence in their own evidence expressed in the written briefs of evidence and answers to questions, against other witnesses' evidence and against any documents;
- (b) Balanced the likelihood that a particular witness's evidence is correct based on how well the totality of their evidence hangs together;
- (c) Considered the demeanour of each witness and the veracity with which they have recalled events including whether each has made appropriate concessions or admissions.

[11] On balance I prefer the evidence of Mr Constable:

- (a) It is supported by two other witnesses and by admissions made by Mr Sayer in cross-examination.
- (b) Mr Constable's account of events is also more credible when I consider the agreed facts. This includes, Mr Sayer storming out of the first altercation, collecting his tools and leaving the garage, Mr Sayer returning his uniform in the second altercation and Mr Sayer commencing other work on 22 February 2016, shortly after handing in his notice and only three working days into the period of notice. These events are consistent with him not intending to work his notice period and rather wanting a payment in lieu of working which Mr Constable was not prepared to pay.
- (c) And finally, Mr Constable's evidence hangs together better and seems more likely, for example Mr Constable's assertion that he wanted Mr Sayer to work the notice period as there was work for him to do is logical and appears correct as Fivefifteen had to outsource some of that work when Mr Sayer did not work the notice period.

Events

[12] At the start of work on 18 February 2016, Mr Sayer resigned by presenting a letter of resignation to Mr Constable. The letter stated:

Please accept this notice of resignation that comes into effect from todays date 18/02/2016. I am giving notice as per the employment contract between us states.

[13] An employee in the workshop had previously advised Mr Constable that Mr Sayer had been talking about leaving Fivefifteen, so he was not surprised to receive this letter of resignation. Mr Constable told Mr Sayer that he was disappointed but not surprised to receive his resignation.

[14] Mr Sayer took exception to this statement and confronted Mr Constable, saying “what the fuck does this mean?” Mr Constable told him that he had heard Mr Sayer was looking for another job. He also told him he would need to work the three week notice period.

[15] Mr Sayer was angry and agitated at this point, possibly because his colleagues had told Mr Constable of his plans or possibly because of Mr Constable telling him he had to work his notice. He responded to Mr Constable by saying “nah, fuck ya, I’m outta here.”

[16] Mr Sayer walked out of Mr Constable’s office and into the workshop. He kicked a door on his way. He then collected his tools and other gear from the workshop and left.

[17] Mr Sayer returned to Fivefifteen later that morning. He had his uniform with him to return to Fivefifteen. He asked Sean Boyd, Fivefifteen Service Manager, to accompany him as he went to speak to Mr Constable.

[18] It appeared to me that Mr Sayer was intending to try to get Mr Constable to agree to pay him out for his notice period if he left immediately. Mr Sayer was not clear on what he intended to do when he returned to the workshop this second time, with his uniform. What is clear to me is that returning the uniform is consistent with not intending to work the notice period. And, Mr Sayer did ask if he could get his final pay if everything finished now. So, it seems to be the case that Mr Sayer wanted to leave immediately and get paid out.

[19] When Mr Constable told Mr Sayer that Fivefifteen needed him to work his notice period, Mr Sayer swore at Mr Constable, told him he was not working his notice period and that he owed him. Mr Sayer threatened to take Mr Constable for everything he had and threatened to destroy his business, before storming out again.

[20] There was then a third altercation between Mr Sayer and Mr Constable on 18 February 2016 at around 10:45 am. Jenny Constable was present during this altercation and Mrs Constable's evidence was consistent with Mr Constable. The details of this altercation are not relevant to my determination; suffice to say that Mr Sayer was aggressive and threatening toward Mr and Mrs Constable. In the end, it was only after Mr Constable threatened to call the Police that Mr Sayer left.

[21] The fourth altercation occurred on the afternoon of 19 February 2016. Mr Sayer entered the Fivefifteen workshop and was abusive and threatening toward Mr Constable.

[22] Further detail of the threats and abuse directed at Mr Constable is not relevant to my determination. I am satisfied that the four altercations occurred as related by Mr Constable, Mr Boyd and Mrs Constable.

Was there a dismissal?

[23] I am satisfied that Mr Sayer did not want to work his notice period. He preferred that Fivefifteen pay him out for this period and became angry, aggressive and abusive when it became clear to him that this was not going to happen. In the end, Mr Constable did tell him to leave the Fivefifteen workshop and in the last altercation, Mr Constable threatened to issue a trespass notice against him. However, these actions were in response to Mr Sayer's aggression and happened after Mr Sayer had already made it clear by his statements and actions that he was not going to work the notice period.

[24] On balance I am not satisfied there was a dismissal but rather Mr Sayer resigned and refused to work his notice period.

[25] Therefore, Mr Sayer cannot succeed in his claim for a personal grievance for unjustified dismissal. And Mr Sayer is not entitled to be paid for the notice period that he chose not to work.

Wage arrears

Claim

[26] Mr Sayer's claim for wage arrears falls to be considered in two parts. First, there is a disputed claim for holiday pay arising out of the transfer of Mr Sayer's employment from a fixed term employment agreement to a permanent employment relationship. And second, there are unpaid sums which are not disputed but have simply been withheld by Fivefifteen as a deduction for the losses Fivefifteen says it has sustained through Mr Sayer's failure to work his notice period.

Holiday pay under the fixed term employment agreement

[27] Mr Sayer first commenced work with Fivefifteen as an Auto Technician from 3 December 2014. This role was based in Queenstown.

[28] Shortly after commencing this role, Mr Sayer agreed to change roles to work in Alexandra. He entered into a fixed term employment arrangement with Fivefifteen based upon the projected work that Fivefifteen had including the current workload and a backlog of work that had built up as well as factoring in the time required for Mr Sayer to gain necessary qualifications that might enable the role to become permanent.

[29] The fixed term employment agreement recorded that period as being from 12 January 2015 until 30 January 2015 but the actual period of employment ran from 12 January 2015 until 6 January 2016. Although the evidence on this was not clear on why this short period was recorded in the agreement, the parties intended the agreement to run up to 12 months as this was the period that would cover the workload, obtaining qualifications and establishing if the role could become permanent.

[30] The fixed term agreement also recorded that Mr Sayer's holiday pay was incorporated into the hourly rate paid to him as an additional 8% of the base hourly rate.

[31] Mr Sayer became a permanent employee with Fivefifteen on 6 January 2016. The terms of Mr Sayer's employment included that he would work 40 hours per week and be paid \$25.00 per hour. Mr Sayer was also entitled to annual leave in

accordance with the Holidays Act 2003 i.e. four weeks annual holiday after 12 months continuous service.

[32] Mr Sayer says that when he negotiated the permanent employment agreement he was concerned that he would not be entitled to take any holidays for a further 12 months, so he raised this with Mr Constable. He says Mr Constable agreed he could take holidays during the first 12 months of his employment under the permanent employment agreement. He took this to mean he was commencing permanent employment with a four week holiday entitlement because he had worked almost 12 months under the fixed term arrangement.

[33] Mr Constable says his agreement was to Mr Sayer taking holidays as they accrued and even in advance of accruing if necessary so that Mr Sayer would be able to take holidays during the first 12 months of the permanent employment. This was never any agreement that Mr Sayer had accrued four weeks leave under his previous employment that he could use as he had been paid holidays as part of his hourly rate and there was nothing accrued.

[34] It is clear to me from reading the fixed term agreement that Mr Sayer's holiday pay was to be paid with his normal pay pursuant to s 28 of the Holidays Act. It is also clear from the evidence that this is what occurred and Mr Sayer did not accrue any holiday entitlement. And Mr Sayer accepts this is what happened.

[35] There are however, two further questions to consider. Did the payment of holiday pay conform to the requirements of s 28 of the Holidays Act? If it did, notwithstanding that Fivefifteen made payment of holiday pay with Mr Sayer's wages and Mr Sayer did not accrue any holidays, was there an agreement to allow him a four-week holiday entitlement at the commencement of his permanent employment?

[36] Section 28 of the Holidays Act provides:

- (1) Despite section 27, an employer may regularly pay annual holiday pay with the employee's pay if –
 - (a) The employee –
 - (i) is employed in accordance with section 66 of the Employment Relations Act 2000 on a fixed-term agreement to work less than 12 months; or
 - (ii)

[37] I am satisfied that Mr Sayer was employed in accordance with s 66 of the Act for a period less than twelve months:

- (a) Fivefifteen and Mr Sayer had agreed his employment would come to an end at the expiry of a period of time, complying with s 66(1) of the Act;
- (b) Fivefifteen had genuine reasons for the employment ending at the expiry of this period and it advised Mr Sayer of this, complying with s 66(2) of the Act;
- (c) The fixed-term agreement stated when Mr Sayer's employment would end, complying with s 66(4) of the Act except that the end of the period was specified incorrectly.

[38] The effect of failing to record the end date correctly in the fixed term agreement does not however affect the validity of the employment agreement. Section 66(5) of the Act specifies this and s 66(6) of the Act makes it clear that the effect of the failure is to mean that an employer cannot rely on the expiry of the period to bring the employment to an end if the employee treats it as being ineffective.

[39] So, there are three reasons why, notwithstanding that the end date of the fixed term was recorded incorrectly, that I believe Mr Sayer was employed in accordance with s 66 of the Act:

- (a) On a strict analysis the fixed term agreement complies because it meets the requirements of ss 66(1), 66(2) and 66(4) of the Act.
- (b) Despite the period being stated incorrectly there is still a valid employment agreement and the employment relationship operated according to those terms for the period Mr Sayer and Fivefifteen had intended.
- (c) The expiry of the period was not relied on by either Mr Sayer or Fivefifteen to bring Mr Sayer's employment to an end and Mr Sayer did not elect to treat the incorrectly recorded period as meaning the fixed term agreement was ineffective.

[40] In essence, what the parties agreed at the outset of the fixed term arrangement occurred including that the term ran for the period expected, it operated for that period for the reasons expected, and Mr Sayer received holiday pay as intended. Ultimately the fixed term was not required as Mr Sayer's employment was extended to become permanent.

[41] In these circumstances I cannot see how it is just to allow Mr Sayer a windfall of four weeks' pay because of an error in drafting, particularly when that error was of no consequence to the operation of the relationship as the parties agreed and there was no prejudice to Mr Sayer.

[42] Therefore, I conclude the Mr Sayer did not accrue four weeks holiday during his fixed term employment that transferred to his permanent employment.

[43] Turning to the remaining question, I do not accept that Fivefifteen agreed that Mr Sayer could commence his permanent employment with an accrued holiday entitlement of four weeks. This is not consistent with Mr Constable's evidence and even Mr Sayer himself appeared to accept that he misunderstood what the position was in respect of his holiday pay entitlement.

[44] Therefore, Mr Sayer is not entitled to wage arrears for four weeks accrued but unused holiday pay.

Agreed amount subject to deduction

[45] Mr Sayer and Fivefifteen agreed that at the end of his employment Mr Sayer was owed:

- (a) Work in the pay period prior to Mr Sayer's resignation, totalling \$1,400.00;
- (b) Payment for a public holiday (8 February 2016), totalling \$200.00;
- (c) Payment for an alternative day for working on a public holiday (11 November 2015), totalling \$175.00;
- (d) Holiday pay owing for earnings from 6 January 2016, being \$464.00.

[46] The total agreed amount owed to Mr Sayer was \$2,239.00. Fivefifteen says that as Mr Sayer did not work his notice period he owes it \$3,000.00, being three

weeks not worked and \$884.92, being losses incurred when it could not complete work booked in for Mr Sayer. And, it has taken these amounts by deduction from the final pay due to Mr Sayer.

[47] The starting point is that Fivefifteen has no right to withhold payment or deduct any amount from any final pay due to Mr Sayer¹ except for an authorised deduction from wages or holiday pay due pursuant to s 5 of the Wages Protection Act 1983². Section 5 of the Wages Protection Act³ allows an employer to make deductions from an employee's wages if it has written consent.

[48] Fivefifteen relies on two clauses in the permanent employment agreement to justify the deduction it has made:

5.3 Deductions may be made by the employer from the employee's remuneration and/or final pay including any holiday pay for any overpayment, default by the employee, for the costs of any uniforms and/or protective clothing and equipment and other property belonging to the employer that are not returned or are damaged by the employee, for debts owing to the employer, for leave in excess of paid entitlements under statute or expressed herein, or for any other deduction by agreement or as otherwise provided for in this agreement.

14.1 The employee shall give or receive the period of notice of termination of employment set out in Schedule A annexed hereto. If the employee does not give the required notice, the employee shall pay, or have deducted from their final pay including any holiday pay, a day's base salary or wages for each day of the notice period not worked.

[49] Fivefifteen says Mr Sayer has agreed the amount he owes in the event of his default in clause 14.1 and has agreed to Fivefifteen deducting that amount from his final pay in both clause 5.3 and clause 14.1.

[50] Clause 5.3 is a forfeiture clause and these clauses have been subject to analysis by the Employment Court in *G L Freeman Holdings Limited v Livingstone*⁴. The Court decided such clauses were unenforceable as penalty provisions.

[51] Applying this analysis to Fivefifteen's actions the outcome is simply that the purported deduction of three weeks wages, being \$3,000.00, for the failure to work

¹ *Edwards (Labour Inspector) v Topo Gigio Restaurant Ltd* AEC 109/95

² *Drake Personnel (New Zealand) Ltd v Taylor* [1996] 2 NZLR 644 (CA)

³ Section 5 of the Wages Protection Act was amended in April 2016. As the deductions in this matter occurred prior to this amendment I have considered the previous version of s 5.

⁴ [2015] NZEmpC 120

three weeks, pursuant to clause 14.1 of the employment agreement is untenable. Clause 14.1 is a penalty provision as the three weeks wages forfeited does not represent the loss that might be incurred by Fivefifteen as a result of Mr Sayer not working and the clause is unenforceable.

[52] As an alternative to relying on clause 14.1 Fivefifteen might be able to deduct any amount that Mr Sayer owes to it, because of him not working the notice period, under clause 5.3, if it can establish an actual loss consequent upon Mr Sayer's actions. And it must establish that the loss is an authorised deduction i.e. it is a deduction contemplated by clause 14.1.

[53] The evidence from Mr Constable was that as a result of Mr Sayer not working his notice period Fivefifteen had to send work it had booked for Mr Sayer to do to another garage as no other employee was certified to do this work. He says this was a loss of \$884.92.

[54] On the face of it then there is a loss that Mr Sayer may have to account for. This loss is not specifically covered by clause 14.1; it is arguably covered by the more general description in the clause of a deduction made for "any default by the employee". The issue with relying on a general deduction clause of this type in an employment agreement is that the employer must consult with the employee before making the deduction⁵.

[55] In my view, Fivefifteen did not consult appropriately with Mr Sayer before making the deduction and therefore it cannot rely on clause 14.1 to justify at least the deduction of \$884.92.

[56] So, in conclusion, neither of the amounts that Fivefifteen says it is owed could be deducted from Mr Sayer's final pay and Fivefifteen must pay Mr Sayer the full amount of his final pay being \$2,239.00 (gross).

Determination

[57] I decline Mr Sayer's claim for a personal grievance for unjustified dismissal. Fivefifteen did not dismiss Mr Sayer.

⁵ *Jonas v Menefy Trucking Ltd* [2013] NZEmpC 200

[58] Mr Sayer is not entitled to four weeks holiday pay for the period that Fivefifteen employed him under a fixed term employment agreement.

[59] Fivefifteen cannot deduct any money from the final pay owing to Mr Sayer. Therefore, Fivefifteen must pay Mr Sayer \$2,239.00 (gross).

Costs

[60] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[61] If they are not able to do so and a determination on costs is needed, any party seeking costs may lodge and serve a memorandum on costs within 28 days of the date of this determination. The other party will have 14 days from the date of service of that memorandum to lodge and serve any reply memorandum.

Peter van Keulen
Member of the Employment Relations Authority