

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 74/10
5276879

BETWEEN PAUL SHENTON
 Applicant

A N D TAYA SIMONE LIMITED t/a
 GERALDINE VILLAGE INN
 Respondent

Member of Authority: Paul Montgomery

Representatives: Applicant in Person
 Charlotte Clifford, Counsel for Respondent

Investigation Meeting: 16 February 2010 at Timaru

Submissions Received: On the day

Determination: 25 March 2010

DETERMINATION OF THE AUTHORITY

[1] Mr Shenton claims his former employer unlawfully deducted money from his final pay and failed to pay him holiday pay upon the employment agreement coming to an end. The remedy he wants is for those monies to be returned to him.

[2] The respondent, through its director Mr Geoff Wynn, accepts the deductions were made but they were lawful because of the agreement between the parties. This provided for the repayment of a return airfare from New Zealand to the United Kingdom and is contained in Schedule A of the individual employment agreement.

[3] The respondent says no agreement was made between Mr Shenton and the company to vary the agreement as required under clause 20 of the individual employment agreement, and hence the original terms of the agreement stand. Accordingly, the deductions were authorised by Mr Shenton and occasioned by his

leaving his employment before the second anniversary of his starting with the respondent.

Essential facts

[4] Mr Shenton is a chef who, after considerable discussion by email and telephone, left the United Kingdom to begin employment with the respondent. As the chef whom Mr Shenton was to replace had resigned on notice, it was agreed the applicant would fly to New Zealand, secure accommodation and commence employment, and then return to the United Kingdom to bring his wife and family to New Zealand.

[5] It is the return trip to bring his family to New Zealand that is in question in this dispute.

[6] Mr Shenton began working on 12 May 2008. He ceased his employment on 24 May 2009. On 24 May 2009, the applicant met with Mr and Ms Wynn after which an agreement was signed between the parties acknowledging the debt was due and the method of payment agreed.

The agreement

[7] Schedule A, which is headed *Summary of terms and conditions of employment* includes the following statement:

Note: Return airfare to England valued at NZD3,000.00 funded by Taya Simone Limited on the basis if employee leaves within two years of commencement date, this will be refunded in full to employer by way of employer having right to deduct from moneys owed i.e. holiday pay or direct debit from employee's bank account.

[8] This schedule is signed by both Mr Shenton and by Ms Wynn on behalf of the respondent.

[9] Clause 20 of the agreement is headed *Variation of disagreement*:

The parties to this agreement acknowledge that circumstances may arise during the term of the agreement that warrant variation of this agreement. The parties agree that this agreement may be varied by agreement in writing and that no such variation will be effective until signed by both parties.

The issues

[10] To resolve this matter, the Authority needs to make findings on the following issues:

- Was the written agreement varied in writing at any time in the course of the applicant's employment; and
- Was the deduction lawful or unlawful?

Discussion and analysis

[11] A matter at issue here is whether a discussion between Vicki Wynn, the company's general manager, and Mrs Shenton gave rise to a change in the agreement in respect of the \$3,000 refund.

[12] The evidence from Mrs Shenton was that a conversation between her and Ms Wynn took place on 8 January 2009 and in which Mrs Shenton asked about the \$3,000 airfare. The witness said Ms Wynn told her the matter would be sorted out on the condition Mr Shenton stayed at the Village Inn until the end of the busy summer season. In fact, Mr Shenton did remain employed for that period.

[13] Ms Wynn's evidence was the discussion took place on 9 January 2009 at the Shentons' home when she called to collect some gear for Mr Shenton. Some family issues had arisen and Mr Shenton moved to alternative accommodation until those issues were resolved. Ms Wynn says Mrs Shenton raised, among other things, the issue of the airfare. Ms Wynn told the Authority *I told her I was not in a position to give her an answer and that she had more urgent matters to focus on*. Ms Wynn confirmed this during her evidence before the Authority and added *Jo [Mrs Shenton] was very upset at the time*.

[14] The other matter is the discussion between the applicant and Mr and Ms Wynn on 24 May 2009 before Mr Shenton finished his final shift.

[15] Mr Shenton says:

I was called into the office and I maintain that under intimidation tactics from Geoff and Vicki (threat of Court) I agreed under duress. I could not verify with Joanne the details of the conversation had between herself and Vicki until finishing my shift that evening. Monday 25 May I sent an email to Vicki after discussing with Joanne

about the conversation to which I got no response from herself ... only a response from Geoff stating that he initiated my contract and that the agreement from the previous day stands.

[16] The Wynns' evidence on the issue of that final meeting was quite different.

Mr Wynn told the Authority:

The meeting was held in the office which is located between the restaurant and the bottle store at the complex. The door was open for the duration of the meeting and staff members were close by.

At the meeting I told Mr Shenton there were no hard feelings but he had broken his contract and the airfare would need to be repaid. He accepted this and agreed to repay it by way of the company withholding wages and holiday pay due to him and to repay the balance over a period of time. Vicki said she would draft the agreement, type it up and asked him to come back after service to sign it, which he did.

There was no pressure put on Mr Shenton to sign the agreement to repay. I did not threaten him with Court action. I used an example to explain the situation. The example I used was when I cancelled a contract with an entertainer and was subsequently taken to the Disputes Tribunal. I was ordered to pay the entertainer for his loss.

It had always been a term of his employment that he would have to repay the airfare should he not work for the company for a minimum of two years. Mr Shenton had some hours to think about the agreement he had reached before returning to sign the agreement to repay.

The following day an email was received from Mr Shenton. ... Mr Shenton expressed his disappointment at the outcome of the meeting on 24 May. There is no allegation of duress in that email. Further Mr Shenton acknowledges that he is obliged to repay the airfare but suggests an alternative method of repayment.

[17] The evidence of Ms Wynn is thoroughly consistent with that of Mr Wynn and at the investigation meeting I satisfied myself there had been a period of some hours between the verbal agreement being reached and the applicant signing the written agreement. I find he had sufficient time to either ask for an adjournment to enable him to discuss the matter with his wife or to propose an alternative method of payment. In the event, he signed the document and I accept that his email on 25 May 2009 does express his disappointment and suggests an alternative method of payment. That, regrettably, does not overturn or render invalid the agreement signed between the parties.

Determination

[18] Returning to the two issues set out above in this determination, I find:

- The written agreement was never varied in writing at any time during the course of the applicant's employment.
- The deduction in relation to the airfare was lawful.

[19] The applicant's claims are dismissed and the Authority can be of no further assistance to him.

Costs

[20] At the close of the investigation meeting, Ms Clifford signalled she would be seeking costs. Rather than put the parties to further expense, I have decided to fix costs.

[21] The investigation meeting took approximately 1¼ hours and counsel was required to prepare two relatively straightforward and brief statements of evidence for each of the respondent's witnesses. The matter was very straightforward and in those circumstances I think it just to award the respondent the sum of \$600 as a contribution to its reasonably incurred costs.

[22] Mr Shenton is to pay the respondent the sum of \$600.00

Paul Montgomery
Member of the Employment Relations Authority