

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 286/07
5086262

BETWEEN SHIRLEY TREGOWETH
 Applicant

AND ALBERT NUMBER SIX LIMITED
 Respondent

Member of Authority: Vicki Campbell

Representatives: Shirley Tregoweth in Person
 Barbara Doyle for Respondent

Investigation Meeting: 22 August 2007 at Hamilton

Determination: 14 September 2007

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Ms Shirley Tregoweth was employed by Albert Number Six Limited as a cleaner. There was no written employment agreement but it was common ground that Ms Tregoweth was paid \$15.00 per hour for her cleaning duties. This was secondary employment for Ms Tregoweth.

[2] Ms Barbara Doyle, the manager of the Motel, travelled overseas in March 2007 for 10 days, leaving the Motel under Ms Tregoweth's management. There is a dispute about the payments Ms Tregoweth was entitled to receive during the period of Ms Doyle's absence. Ms Tregoweth says they agreed that she would receive \$115.00 net for each day in addition to her normal \$15.00 per hour for cleaning. Ms Doyle says the agreement was for payment of \$100.00 per day. It has not been necessary to resolve the question of how much should have been paid, as Ms Doyle paid Ms Tregoweth an amount of \$1,142.80 as her management fee, on her return from overseas and there is no dispute that this amount was correct.

[3] There is, however, a dispute about the number of hours cleaning Ms Tregoweth undertook during Ms Doyle's absence. Ms Tregoweth claimed she had completed 45 hours cleaning, which included doing the laundry and some spring cleaning during the quiet times at the motel.

[4] After paying her for the time Ms Tregoweth claimed, without comment, Ms Doyle decided Ms Tregoweth had overcharged her and deducted from Ms Tregoweth's final pay calculation an amount equivalent to 17 hours, which Ms Doyle says, was the number of hours Ms Tregoweth overcharged for her cleaning duties.

[5] In addition to the deductions for the alleged overpayment of hours for cleaning Ms Doyle made deductions from Ms Tregoweth's final pay (including holiday pay) an amount equal to two days pay for lack of notice (which included a public holiday) together with the PAYE Ms Doyle says was not deducted from an earlier payment made to Ms Tregoweth for her management fees.

[6] Ms Tregoweth claims an amount of \$1,190.46 is owed, being payment of her final week's work and holiday pay.

Legal issues

[7] Sections 4 and 5 of the Wages Protection Act 1983 sets out the legal requirement that employers must pay all wages due to an employee without deduction. The only exception to that obligation is where the employee has provided written consent for the deduction or has made a written request.

[8] There was no written employment agreement between the parties and it was common ground at the investigation meeting that Ms Tregoweth had not consented to any deductions being made. It follows, therefore, that Ms Doyle had no authority to make any deductions from Ms Tregoweth's final pay and any such deductions were unlawful.

Final Week's wages

[9] It was common ground that the two women had an argument on Sunday, 8 April 2007. As a result of that argument Ms Tregoweth resigned from her position and asked for her final pay to be made up.

[10] Ms Tregoweth seeks arrears of wages for the week 2-8 April 2007 inclusive being her final week of employment and which she worked. It is not disputed that Ms Tregoweth worked 19 hours in that last week including 5 hours worked on Good Friday being a public holiday.

[11] Ms Doyle told me that as Ms Tregoweth left the workplace with no notice she was entitled to deduct for lack of notice. I do not agree with Ms Doyle on this

point. Due to the lack of a written clause to the contrary, and pursuant to section 4 and 5 of the Wages Protection Act 1983 Ms Tregoweth is entitled to be paid for her weeks work without deduction.

[12] For Good Friday Ms Tregoweth is entitled to payment at her ordinary rate plus ½ rate again for each hour worked on the public holiday, plus an additional days pay being the day in lieu for working a public holiday, and which remained an entitlement at the end of Ms Tregoweth's employment.

Albert Number Six Ltd is ordered to pay to Ms Tregoweth an amount of \$397.50 gross arrears of wages within 28 days of the date of this determination.

Holiday Pay

[13] It was common ground at the investigation meeting that Ms Tregoweth's holiday pay component of her final pay was an amount of \$792.96.

Albert Number Six Ltd is ordered to pay to Ms Tregoweth an amount of \$792.96 gross as holiday pay within 28 days of the date of this determination.

PAYE on the Management Fee

[14] Ms Tregoweth says the income she received from Ms Doyle, which I have referred to as the "management fee" was to be paid to her net of tax. Ms Doyle says the money was to have been taxed, if Ms Tregoweth did not sign the contract left for her when Ms Doyle went overseas. In reliance on that Ms Doyle arranged for the tax component of the management fee to be calculated and deducted from Ms Tregoweth's final pay, and it was then remitted to IRD on Ms Tregoweth's behalf.

[15] I am satisfied that on the balance of probabilities it is more likely than not that the \$1,142.80 paid to Ms Tregoweth for the 10 days Ms Doyle was absent from the business was, as intended, as a gross amount. I have reached that conclusion on the basis that Ms Tregoweth was paid wages for her cleaning hours, on which PAYE was calculated. Ms Tregoweth told me that the cleaning amounts were also to have been paid as gross amounts. While the cleaning hours payments have been entered into the wages and time records, the payment of the management fee has not.

[16] The liability for the payment of tax on income is the responsibility of the tax payer. Ms Tregoweth had not paid tax on her management fee income and as a matter of convenience it was deducted at the end of her employment and

remitted to IRD. The deduction being made as it was, without explanation to Ms Tregoweth, and at a time when emotions were running high, has led to allegations and counter-allegations between the two ladies. The result is, however, that the money has been remitted to IRD on Ms Tregoweth's behalf and the respondent is entitled to be recompensed for it.

The sums ordered to be paid to Ms Tregoweth in this determination are to be off-set by the amount of PAYE tax attributable to the management fee, Albert Number Six Limited has remitted to IRD on Ms Tregoweth's behalf.

[17] It will be left to the parties to resolve the quantum of the tax liability, however, leave is reserved to return to the Authority if agreement can not be reached.

Costs

[18] Neither party was represented at the investigation meeting. Ms Tregoweth is entitled to reimbursement of her filing fee.

Albert Number Six Limited is ordered to pay to Ms Tregoweth \$70 without deduction as reimbursement of her filing fee.

Summary of orders

- Albert Number Six Ltd is ordered to pay to Ms Tregoweth an amount of **\$397.50** gross, as arrears of wages within 28 days of the date of this determination.
- Albert Number Six Ltd is ordered to pay to Ms Tregoweth an amount of **\$792.96** gross as holiday pay within 28 days of the date of this determination.
- The total amount is to be off-set by the amount of PAYE tax attributable to the management fee only and which Albert Number Six Limited has already remitted to IRD on Ms Tregoweth's behalf.
- Albert Number Six Limited is ordered to pay to Ms Tregoweth \$70 without deduction as reimbursement of her filing fee.

Vicki Campbell
Member of Employment Relations Authority