

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH OFFICE**

[2012] NZERA Christchurch 239  
5368199

BETWEEN           FRANCES TUCKETT AND  
                          SHAUN PARR  
                          Applicants

AND                   STRAWBERRY TREE LIMITED  
                          Respondent

Member of Authority:   David Appleton

Representatives:       Applicant in person by telephone  
                              Shayne Kavanagh Advocate for Respondent

Investigation Meeting:  30 October 2012 in Kaikoura

Submissions received:  30 October 2012

Determination:         1 November 2012

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**DETERMINATION OF THE AUTHORITY**

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- A.     The Applicants are owed the sums claimed.**
- B.     The respondent's counterclaims are dismissed.**
- C.     No legal costs are awarded as the Applicants represented themselves.**

**Employment relationship problem**

[1]     Ms Tuckett and Mr Parr worked as duty managers in the Strawberry Tree Tavern in Kaikoura. Ms Tuckett claims she is owed the total gross sum of \$4,554.75, comprising \$3,214.75 gross unpaid holiday pay, \$620.00 for her final week's gross pay and the gross sum of \$720 in respect of six alternative public holidays which she did not take during her employment.

[2] Mr Parr claims he is owed the gross sum of \$1,787.70, being made up of \$1,147.70 gross unpaid holiday pay and \$640.00 in respect of the final week's gross pay. He does not claim any sum in respect of alternative holidays.

[3] Neither applicant wished to pursue unjustified dismissal claims against the respondent.

[4] The respondent claims that it is entitled to withhold these sums, save for the alternative holidays which it claims have been paid to Ms Tuckett. The respondent counterclaims in respect of a lawnmower which it says was not returned to it by the applicants and also counterclaims for damages in respect of lost trade caused by the applicants allegedly abandoning their employment. It also claims penalties for breach of the applicants' employment agreements.

[5] Ms Tuckett and Mr Parr are currently working in Australia, and so gave their evidence by telephone. Mr Kavanagh was present in person. Written statements from two former employees of the respondent were provided via the respondent's former representative after the close of the investigation meeting. The late provision of these statements does not appear to have been the fault of the respondent or Mr Kavanagh, however. The applicants replied to these statements extremely promptly. I did not need to question either of the two witnesses, however, as their evidence was largely irrelevant to the issues at hand.

[6] As the applicants are due to leave Australia in around two weeks' time to return to the UK, I have determined their applications on an urgent basis.

*A brief account of the facts leading to the claims.*

[7] Ms Tuckett and Mr Parr are both British and Ms Tuckett started working at the Strawberry Tree Tavern under the working holiday scheme in or around September 2010. In approximately June 2011, Mr Parr also started working at the Tavern. Mr Parr is Ms Tuckett's partner. The respondent agreed to employ Ms Tuckett and Mr Parr as a management couple in October 2011. At the time their employment ceased, on or shortly after 28 December 2011, Mr Parr was earning \$16 per hour and Ms Tuckett was earning \$18 per hour.

[8] As is common in the hospitality industry, the staff worked shifts in accordance with a roster. The problems between the applicants and the respondent arose on

28 December 2011. It is the applicants' evidence that no roster had been fixed in respect of the week commencing 26 December and that, accordingly, they had asked Mr Kavanagh, the owner of the Tavern, on 24 December, what shifts they should be working. At this time, both Ms Tuckett and Mr Parr were working their notice as they had decided to leave New Zealand due to unexpected complications with Ms Tuckett's application for a work permit. Their notice was due to expire on 11 January 2012. They had both given longer notice that had been required under their respective employment agreements.

[9] Ms Tuckett and Mr Parr both state that Mr Kavanagh told them on 24 December that he was too busy to sort out the roster for the following week and the staff should just sort it out amongst themselves. Their evidence is that they did this and that they had agreed with the other staff that they would both have Wednesday 28 December 2011 off.

[10] Mr Kavanagh's evidence is that the roster had already been fixed for that week commencing 26 December and that Shaun had been rostered to commence work at 6pm on 28 December. He said he had told both of the applicants that the roster was not to be changed. Unfortunately, the roster was no longer available for the period in question.

[11] Ms Tuckett gave evidence that, on Tuesday 27 December at 18.51 Mr Kavanagh's partner Ms West sent a text to Ms Tuckett as follows:

*Hey fran shayne asked me to tell u ur opening wed thur fri sat at 12. X*

A photocopy of this text on Ms Tuckett's mobile telephone was seen by the Authority.

[12] Ms Tuckett's evidence was that she replied to this text saying that she was not working on Wednesday and that another member of staff was and that Mr Parr would be opening the pub on Thursday at 12pm.

[13] Ms Tuckett said that she did not receive a response to her reply. Mr Parr's evidence was that, the following morning, before noon, a telephone call came through to Ms Tuckett's mobile phone but that Ms Tuckett was not around to answer it. He therefore answered it and spoke to Mr Kavanagh. Mr Parr's evidence is that Mr Kavanagh asked him where he should meet Ms Tuckett to give her the key so that she could open up. Mr Parr responded that it was the other staff member's day to

open up that day. Mr Parr said that Mr Kavanagh then told him that *if one of you are not there by 12 then you don't have jobs.*

[14] Both Mr Parr and Ms Tuckett were unable to be there at 12 as they had other arrangements which they could not change and so they took Mr Kavanagh at his word and assumed that they had therefore been dismissed. Although they were both rostered to work the following days, neither of them made contact with Mr Kavanagh in the belief that they had been dismissed.

[15] Mr Kavanagh's evidence is quite different. He states that Mr Parr had been rostered to be at work at 6pm on Wednesday 28 December 2011, and that he had called Mr Parr at or shortly after 6pm that evening because Mr Kavanagh had been told by a member of staff that Mr Parr had not turned up to work. He says that Mr Parr told him that he was not going to work that day. Mr Kavanagh denies that he said that neither of them had jobs if one of them did not turn up. His evidence is that Mr Parr did not turn up for his evening shift on 28 December and, when neither Mr Parr or Ms Tuckett turned up the following day for their shifts, he assumed that they had both abandoned their employment.

[16] Ms Tuckett and Mr Parr say that they contacted Mr Kavanagh around five days later asking for their final week's pay, whereas Mr Kavanagh says he did not hear from them for at least 10 days. Mr Kavanagh gave evidence that his accountant had been away on holiday around that time as well, and Mr Kavanagh wanted to speak to him about the situation.

[17] Mr Kavanagh says that he is holding back a week's pay from both applicants because he is entitled to do so under their employment agreement when a party fails to work their notice. He states that he is holding back holiday pay because he is owed money by way of damages in respect of a lawnmower that he says he lent to the applicants and which was not given back to him. He also states that he has suffered damages when the two applicants failed to turn up for work as he was unable to find replacement duty managers at such short notice and had to close the pub. Finally, he states that Ms Tuckett was paid for the alternative holidays.

**Issues**

[18] The Authority must decide the following issues:

- (i) whether Mr Kavanagh terminated the employment of the applicants or whether they abandoned their employment;
- (ii) if the applicants did abandon their employment, whether that entitles the respondent to withhold a week's pay from each applicant;
- (iii) whether the respondent is entitled to withhold holiday pay;
- (iv) whether the respondent has a valid counterclaim against the applicants in respect of a lost lawnmower and damages caused to the respondent by having to close;
- (v) whether the respondent has already paid Ms Tuckett in respect of six days' alternative holidays.

*Were the applicants dismissed or did they abandon their employment?*

[19] Mr Kavanagh's evidence was that the pub was approaching the busiest time of the year (the New Year period) and that he would not have dismissed two duty managers, as it would have put him in serious difficulty. Ms Tuckett's evidence was that she and Mr Parr intended to work through until their last day of notice and, in fact, continued to rent their property in Kaikoura until the day that they flew out of New Zealand to Australia. They took their responsibilities seriously, she said, and equally would not have walked out knowing that the pub was facing its busiest time of the year.

[20] It is impossible to get to the bottom of exactly what happened with any certainty, but it is my belief that a misunderstanding probably arose between Mr Kavanagh and the applicants, with Mr Kavanagh believing that either Ms Tuckett or Mr Parr was due to work on 28 December and Ms Tuckett and Mr Parr having agreed with the other staff that they would not.

[21] On balance, I prefer the evidence of Mr Parr when he says that he was telephoned in the morning rather than the evening of 28 December and that he was told that neither of the two would have jobs if one of them did not turn up at 12 to

open up. I say this partly because Mr Kavanagh's evidence contained inconsistencies generally and was vague in places, whereas the applicants' evidence was consistent and detailed throughout. I also say this because of the text that Ms Tuckett received from Ms West which contradicted Mr Kavanagh's evidence to the Authority.

[22] Therefore, I do believe that the applicants genuinely believed that they had been dismissed with effect from 28 December 2011 but think it is a pity that neither the applicants nor Mr Kavanagh got in touch with the other to try to sort things out once the heat had gone out of the discussion.

*Is the respondent entitled to withhold one week's pay from each applicant?*

[23] It is my finding that Mr Kavanagh did dismiss the applicants on 28 December, and, accordingly, he cannot rely upon the clause in the employment agreement signed by both applicants entitling him to keep back one week's wages.

[24] Even if I am wrong in this, Mr Kavanagh did not comply with the terms of the clause in question. The clause states as follows:

***Clause 12.1***

*Where either party terminates the employment without giving the required period of notice, one week's wages shall be paid or forfeited by the defaulting party.*

***Clause 12.5***

*Where the employee absents himself/herself from work for three or more consecutive scheduled working days without notification to the employer, the employer, after making reasonable inquiries, shall be entitled to conclude that the employment has been terminated by the employee by reason of abandonment without notice.*

[25] If Mr Kavanagh is correct in stating that he believed that the applicants had abandoned their employment, it is clear that he did not make *reasonable inquiries* as is required by clause 12.5 of the employment agreement. Therefore, not having made those reasonable inquiries, Mr Kavanagh was not able to conclude that the applicants had abandoned their employment. Therefore, I do not believe that he was entitled to withhold one week's pay from each of them.

[26] In summary, I do not believe that the respondent was entitled to withhold one week's pay from Mr Parr and from Ms Tuckett.

*Is the respondent entitled to withhold holiday pay?*

[27] The employment agreements signed by both applicants contain a clause dealing with deductions from wages and/or holiday pay. The text of this clause is as follows:

***Clause 8.2***

*Deductions may be made from the employee's wages and/or holiday pay in the following circumstances:*

- i. unapproved sick leave or other unpaid absences and for leave without pay which has been agreed between the parties;*
- ii. by agreement between the employer and the employee;*
- iii. as otherwise provided by this agreement;*
- iv. from final pay for any un-returned protective clothing, equipment, or any other property, or any debt believed by the employer to be owing to the employer, whatsoever it may be, including damage to the employer's property as a result of the employee's thought or carelessness.*

*8.2.1 Before making any deductions under this Clause you will be consulted as to the circumstances and the amount of the deduction.*

[28] It is understood that the respondent is relying on Clause 8.2(iv) to entitle it to withhold the payment of holiday pay from the applicants due to the applicants not returning a lawnmower and because of losses Mr Kavanagh says their abandonment caused to the business. Mr Kavanagh had initially stated to a Labour Inspector who had been asked by the applicants to investigate their complaints that the applicants had failed to return a motor vehicle belonging to the respondent and that parking fines had been incurred as the company had not been aware where the vehicle had been left. Mr Kavanagh had to admit later that this was not true after the applicants had obtained proof from Kaikoura District Council that no parking infringements had been incurred with respect to the vehicle in question.

[29] The respondent is now relying on an alleged failure to return a lawnmower that had been lent to the applicants. The applicants' evidence is that when they inspected the lawnmower, which was in one of the properties owned by Mr Kavanagh, they found that it did not work and they left it in the property without taking it. Mr Kavanagh's evidence was that when he went to sell that particular property the lawnmower was no longer there. He said its value was in the region of \$300-\$400. In view of the inaccuracy of the original claim with respect to the withholding of a vehicle, I prefer the evidence of the applicants with respect to the

lawnmower. I find specifically that the applicants did not take the lawnmower, and that, if it has gone missing, that is not the responsibility or fault of the applicants.

[30] I therefore determine that the respondent is not entitled to withhold any sums with respect to the missing lawnmower, pursuant to clause 8.2(iv).

[31] Mr Kavanagh also stated that, because the applicants abandoned their employment, he was unable to open because he did not have a duty manager at the busiest time of the year. A statement had been prepared for Mr Kavanagh which stated that the Strawberry Tree pub had been unable to open between the hours of 11am and 4pm per day for three weeks and that it lost 42 hours of trade as a consequence of the actions of the applicants. This, however, is clearly inaccurate as the applicants had given notice which was due to expire on 11 January 2012 which is a period of only two weeks from 28 December 2011.

[32] I have no doubt that Mr Kavanagh suffered inconvenience as a result of the applicants not turning up for their duties after 28 December 2011 and that this may have meant that the pub suffered some loss of revenue. However, as I have found that, on balance, Mr Kavanagh said words which reasonably led the applicants to believe that their employment had been terminated on 28 December 2011, the applicants cannot be held responsible for any losses that arose as a result of them failing to turn up for work during the rest of their notice period. Also, Mr Kavanagh failed to mitigate any losses by not attempting to contact the applicants when they did not turn up for work on 29 December.

[33] The wording of clause 8.2.1 makes clear that the applicants should have been consulted with before any deductions were made under clause 8.2. There is no evidence whatsoever that Mr Kavanagh or anyone else consulted with the applicants with respect to the withholding of the holiday pay and, therefore, I cannot find that the respondent is entitled to withhold the sums owed.

[34] Finally, it would appear, in any event, that the wording of clause 8.2 of the employment agreements relied upon by the respondent to withhold holiday pay has no effect to the extent that it excludes, restricts or reduces the applicants' rights under the Holidays Act 2003 to receive holiday pay. (As is provided by s. 6(3) of that Act).

*Does the respondent have a valid counterclaim?*

[35] In view of my findings above, I do not find that the respondent has a valid counterclaim against the applicant.

*Has the respondent already paid Ms Tuckett for six days alternative holidays?*

[36] Section 56 of the Holidays Act 2003 provides that an employee is entitled to another day's holiday (an alternative holiday) instead of a public holiday if the public holiday falls on the day that would otherwise be a working day for the employee and the employee works on part of that day. Section 60 states that an employer must pay an employee not less than the employee's relevant daily pay or average daily pay for the day which is taken as the alternative holiday.

[37] Ms Tuckett gave evidence that she had worked on six public holidays and had not taken any alternative holidays in relation to these days. Mr Kavanagh's evidence was that he had paid Ms Tuckett for these days and pointed to evidence in his wages record. However, upon scrutiny of the wages records and questioning of Mr Kavanagh, it appears that his annotations showed the actual public holidays on which Ms Tuckett had worked rather than payment for alternative holidays. The evidence was that Mr Kavanagh paid for the hours that he was advised by Ms Tuckett that she had worked. Ms Tuckett's evidence was that she had never told Mr Kavanagh that she had taken alternative holidays and she said that she had never been paid for having a day off.

[38] In the light of this evidence from Ms Tuckett, which I believe, I think that Mr Kavanagh is mistaken when he states that Ms Tuckett had been paid in respect of the alternative holidays she is owed.

[39] Accordingly, the respondent owes Ms Tuckett in respect of six alternative days leave not taken.

### **Summary**

[40] I find that the respondent owes to the applicants the sums claimed. I also find that the applicants have not breached their employment agreement and so decline to award any penalties against the applicants. I also find that the respondent's counterclaims against the applicants fail.

## **Determination**

[41] The respondent is ordered to pay the following sums:

To Mr Parr:

- The gross sum of \$1,147.70 in respect of accrued but untaken holiday;
- The gross sum of \$640.00 in respect of the final weeks work carried out by Mr Parr.

To Ms Tuckett

- The gross sum of \$3,214.75 in respect of accrued but untaken holidays;
- The gross sum of \$620.00 in respect of the final week of work she carried out for the respondent; and
- The gross sum of \$720 in respect of six alternative holidays not taken. (Ms Tuckett claims this sum based on a nominal 8 hours work per alternative holiday day at \$15 per hour. I believe that this is a reasonable way of working out what Ms Tuckett is owed.)

## **Costs**

[42] The applicants represented themselves throughout the proceedings and, accordingly no legal costs should have been incurred.

David Appleton

Member of the Employment Relations Authority