



New Zealand Employment Relations Authority Decisions

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Violet v The Oldest Kiwi Pub Limited (Wellington) [2011] NZERA 550; [2011] NZERA Wellington 130 (1 August 2011)

Last Updated: 24 August 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY WELLINGTON

[2011] NZERA Wellington 130
5344597

BETWEEN STEPHANIE VIOLET

WARREN Applicant

AND THE OLDEST KIWI PUB

LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

P R Stapp

Mr P L Meads, Advocate for the Applicant John Todd-Lambie for the Respondent

28 July 2011 at Palmerston North

1 August 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Stephanie Warren had a deduction of \$623.00 (called IOUs) made from her final pay when she left her employment in February 2011. She has claimed the recovery of this money.

[2] The Oldest Kiwi Pub Limited has denied Ms Warren's claim. It claimed that the deduction was made to recover variances in gaming and TAB operations while Ms Warren was the sole operator and that she acknowledged her errors.

[3] Ms Warren denied that she owed such money and relied on an earlier record of settlement in mediation (a record of settlement dated 21 September 2010 and signed off by a mediator from the Department of Labour) that represented a full and final settlement of all matters arising out of the employment relationship up to and including 21 September 2010. After that she had some leave and returned to work until she resigned in February 2011. Ms Warren and John Todd-Lambie an authorised agent for the respondent met on 24 February 2011 for the purpose of enabling Ms Warren to collect her final pay. Initially her pay was prepared by way of cheques, but she was paid in cash.

The facts

[4] Ms Warren was employed by the Oldest Kiwi Pub Limited as a bar person and TAB gaming attendant. The parties had an employment agreement. In that employment agreement there was a provision for deductions from wages and/or holiday pay as follows:

8.2 Deductions from wages and/or holiday pay

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 for leave without pay which has been agreed between the parties;
- (ii) by agreement between the employer and 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 fault or carelessness.

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

[5] In another clause there was provision made for gaming and reads (verbatim) as follows:

20.0 Gaming

20.1 The employee acknowledges that he will be trained and become competent in the daily operations of gaming machines and TBA. The employee agrees that it is an essential clause of this Agreement that any operator errors, that result in a shortfall in cash, which are incurred as a result of the employees negligence or not following operating policies during the employees rostered shift, will be reimbursed by the employee. eg: if a cancelled credit has not been correctly reset and overpay situation arises.

[6] Ms Warren says that Mr Todd-Lambie informed her that the sum deducted was for money owed before 21 September 2010. Ms Warren produced a mediated settlement that was reached on 21 September 2010 that recorded a full and final settlement of all matters up until 21 September 2010. She says this included money from "unders" on the gaming machines and TAB and that she would not have to repay after that date. No deductions for any monies owing were made from Ms Warren's pay from 21 September 2010 and before she resigned.

[7] Ms Warren resigned in writing on 4 February 2011 to take affect on 18 February. Mr Todd-Lambie replied and accepted her resignation as follows (verbatim):

*...I would like to remind you that it is company policy that your final pay including any Holiday pay and Lieu Pay owing **is paid by cheque**. Please ensure that you have returned any company property and settled any debts owing to the company as soon as possible. We will offset any outstanding monies.*

[8] Her last day was confirmed as 18 February 2011. She was provided with her final pay at a meeting held on 24 February with Mr Todd-Lambie. The items for payment were provided in a letter dated 24 February 2011 and this included a deduction for \$623 IOUs. Mr Todd-Lambie was relying on information from the bar manager, although he had no direct knowledge of the details of the gaming and TAB variances. Ms Warren signed the letter with an acknowledgement and declaration of a full and final settlement of all matters to obtain at least the balance of the money owing. Ms Warren was not properly informed of her rights and the implications of her actions before signing the declaration. She was not represented at the meeting and had no details of the calculation of the IOUs. The parties have different memories of the length of the meeting and whether or not Ms Warren had a predicament with the behaviour of her child at the time.

[9] There is no record of any consultations occurring between Ms Warren and her employer prior to the decision to make the deduction. There have been no itemised details of the IOUs provided that the respondent has referred to and relied upon for making the deduction from Ms Warren's final pay.

Outcome

[10] The respondent provided the applicant's employment agreement and timesheets and payslips as requested. The applicant was able to confirm them.

[11] The respondent is entitled to rely upon the employment agreement to make deductions from the final pay.

[12] However, the respondent's failure to provide details and verify the items included in the IOUs means that the deduction can not be substantiated given there is a dispute over the sum. Moreover there was no consultation before the deduction was made. Indeed the decision was made to make the deduction before the letter dated 24 February 2011 was provided to Ms Warren. This also means that the money must be paid. Mr Todd-Lambie informed me that he was relying on the bar manager's information and had no written details to support the sum of the deduction. An adjournment in the proceedings occurred to enable Mr Todd-Lambie to call the bar manager, but this person was not available.

[13] I also hold that the information Mr Todd-Lambie provided at the investigation meeting was inadequate to substantiate the sum of the deduction. The document/information recorded three sums for repayment, but related to dates prior to 21 September 2010. A reference to the \$623.00 deduction in the final pay was provided as an additional handwritten notation on the document (called "gaming variances July 2010"). This was not sufficient for any verification, I hold.

[14] The respondent has not complied with the requirements of clause 8.2 to properly consult that must include the employer providing details of the variances, especially since Ms Warren disputed the sum and says that others could have been responsible of the "unders" in the gaming and TAB operation. It is also implied under clause 20 that before any deduction is made that details are provided. For the above reasons the deduction has to be paid. The respondent's actions outlined in the resignation acceptance letter therefore have been negated by the respondent's omissions, I hold.

[15] The record of settlement produced that made provision for the full and final settlement of all matters arising out of the employment relationship up to and including 21 September means that any payment referred to by Mr Todd-Lambie can not be revisited, I hold. This is because of the reference to "all claims". The parties have an issue about some sums applying to this period. The full and final nature of the settlement means that Mr Todd-Lambie cannot make a deduction for money in the final pay that relates to that earlier period.

[16] The applicant is entitled to be paid the deduction of \$623.00. **Orders of the Authority**

[17] I order the Old Kiwi Pub Limited to pay Ms Warren \$623.00.

[18] The Old Kiwi Pub Limited is also ordered to pay Ms Warren the \$71.56 filing fee. Otherwise costs are to lie where they fall. This is because there have been no invoices and only loose arrangements made for a vague contingency payment for Mr Meads, who has been helping the applicant and is a family friend.

P R Stapp

Member of the Employment Relations Authority

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