IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND

[2016] NZERA Auckland 265
5608263

	BETWEEN	ROBERT WATSON Applicant
	A N D	POOLCARE LIMITED Respondent

Member of Authority:	Nicola Craig
Representatives:	Applicant in person David Smith, Director of Respondent
Investigation Meeting:	On the papers
Submissions Received:	23 May 2016 from Applicant 30 June 2016 from Respondent
Date of Determination:	04 August 2016

DETERMINATION OF THE AUTHORITY

Poolcare Limited is to pay Robert Watson the sum of $590.00 for deductions made from his pay which it was not entitled to make, together with $71.56 being the filing fee.

Employment relationship problem

[1] Robert Watson (Mr Watson) was employed by Poolcare Limited (Poolcare or the company) as a pool care technician. Mr Watson resigned and finished working for Poolcare on 25 November 2015. Mr Watson's final pay included his holiday pay, but had three deductions made from it, for $590, $360 and $30. Mr Watson claims that under the Wages Protection Act 1983 (the Act) Poolcare was not entitled to make at least some of those deductions and should pay those sums to him.

[2] Clause 19D of the individual employment agreement between Poolcare and Mr Watson included the following provision regarding deductions:

> *On resignation/termination the Employee shall return to the Employer all equipment, material or other property of the Employer prior to receiving final payment. If any such equipment, material other property (*sic*) is not returned, or is returned in poor state or condition (fair wear and tear excepted), the Employer may deduct the costs of repair/replacement thereof from final payment.*

[3] There is no dispute between the parties as to the correctness of the calculation of the final pay amount prior to the deductions. The employment relationship problem concerns the lawfulness of the deductions.

[4] There was some confusion regarding what the deductions were for, as this was unfortunately not specified by Poolcare at the time that the payment was made. Mr Watson followed up with Poolcare on this. Emails from the company to Mr Watson on 12 and 23 December 2015 stated that the deductions concerned a course undertaken, a pool cover taken and given to family, and uniform returned in a poor state, but did not say which amount was for which item.

[5] Mr Watson had attended a course shortly before he left Poolcare's employment and had agreed to repay the cost of that course, under a bonding type arrangement, if he left employment within 12 months. In an email of 16 December 2016 to Poolcare, Mr Watson stated that he accepted the $360 deduction for the course cost. He did not accept the other two deductions.

[6] In the course of this proceeding it became apparent that the $360 deduction was not made by Poolcare for the course cost, but rather the $590 deduction related to the course. The $360 had been deducted for the pool cover.

[7] In the statement of problem Mr Watson claimed payment for the $590 and $30 deductions. Poolcare in its statement in reply asserted that it was entitled to make all three deductions.

[8] At a case management conference on 10 May 2016, the parties agreed to have this matter determined on the papers. A timetable was set for the provision of written statements for both parties. Mr Watson provided a statement. Poolcare subsequently provided a statement from David Smith (Mr Smith), director of the company.

The issues

[9] The issues for determination are:

(a) Was Poolcare entitled to deduct $590 from Mr Watson's final pay regarding the course which he attended?

(b) Was Poolcare entitled to deduct $360 from Mr Watson's final pay for the pool cover?

(c) Was Poolcare entitled to deduct $30 from Mr Watson's final pay for damaged wet weather gear?

Wages Protection Act

[10] Under the Act no deductions are to be made from wages payable to a worker except in accordance with the Act[1].

[11] The Wages Protection Amendment Act 2016 made changes to section 5 of the Act regarding deductions with a worker's consent. However, these changes only came into effect from 1 April 2016, after the deductions were made by Poolcare. Mr Watson's case is therefore considered under the provision in place until 31 March 2016. This provided that an employer may make deductions from wages for any lawful purpose with the written consent of the employee or on their written request[2].

[12] There are two documents which Poolcare effectively claim provides Mr Watson's consent to the deductions. These are the employment agreement and a letter which Mr Watson signed regarding the course. The question is whether and to what extent those documents provide Mr Watson's consent to Poolcare making the various deductions.

Course

[13] Mr Watson attended a one day pool course on 28 October 2015. A month before that he had given his signed agreement to the terms of a letter from the company[3] including the following:

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[1] s 4
[2] s 5 (1)
[3] 25 September 2015

As this training course is over $400.00 we request that you accept a continuous service tie-in to the company before the company will agree to the payment.

In your case this continuous service tie-in will be:

Leave within 12 months of the start of the training and you will be required to repay 100% of the costs.

[14] Poolcare filed an invoice from the course provider showing the course fee as $414 including GST[4]. After Mr Watson gave his notice of resignation, Poolcare wrote to him on 18 November 2015 outlining various matters concerning his departure and post-employment obligations. Included was a statement that the company would be deducting $414 for the cost of the course from Mr Watson's final pay.

[15] In the end Poolcare actually deducted $590 for the costs of Mr Watson's attendance at the course. It only became apparent to Mr Watson when the statement in reply was filed, that the $590 included $176[5] as Mr Watson's wages for the time which he spent at the course, as well as $414 for the course fee. Prior to this Mr Watson had initially accepted the deduction of $360 as the (GST exclusive) cost of the course. However, he does not accept that his wages should have been deducted.

[16] I accept that Poolcare was entitled to deduct the sum of $360, being the GST exclusive course cost, from Mr Watson's final pay[6].

[17] I am not satisfied that the reference in the 25 September 2015 letter to "100% of the costs" being repaid, includes Mr Watson's wages for the day of the course. The letter of 18 November 2015 did not indicate that any deduction was to be made for the time Mr Watson attended the course. There was no evidence that the company had to spend any additional money covering Mr Watson's duties on the course day. They were already required to pay his wages, so this was not an additional cost associated with the course.

[18] Therefore Poolcare is to pay Mr Watson $230, being $590 less the $360 the company was entitled to deduct.

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[4] $360 excluding GST
[5] This appears to be the gross amount of daily wages for Mr Watson.
[6] The company is GST registered and is able to set off the GST.

Pool Cover

[19] Poolcare deducted $360 for the pool cover. In the statement in reply Poolcare stated that the amount for the cover had been reduced as 12 months' service was completed[7]. It was not specified why service would change the amount, although perhaps a similar approach to the service tie-in agreement was taken. At the case management conference, Mr Smith stated that the amount of $360 deducted for the pool cover was a reduced amount, with $575 being the original price.

[20] Mr Watson said that he had taken the used cover but understood that he was allowed to do so. At the case management conference he stated that he was told that if he wanted to take the swimming pool cover he needed to have it gone (from Poolcare premises). There was no mention of there being a charge.

[21] In his witness statement, Mr Watson stated that the second hand pool cover was collected from the Poolcare premises on 24 December 2014 by his sister and her family. Mr Watson said that Mr Smith was present at that time, witnessing the cover being handed over, and made no comment then or in the months following to indicate that payment was required.

[22] A Poolcare invoice to Mr Watson was filed in the Authority by the company. The invoice was for $575 (including GST), dated 5 January 2015 with a due date of 12 January 2015, and referred to:

> *SECOND HAND SALVAGE POOL COVER GIVEN AWAY*
> *ON 24th DECEMBER 2014*

[23] However, Mr Watson said he had not seen that invoice at any time while he was employed by Poolcare. He stated that had he seen the invoice, the cover would have been returned promptly. He also noted that when a new (replacement) employment agreement was issued to him in July 2015 there was no reference to the cover or payment thereof.

[24] Mr Watson stated that in the eight years he had been employed in the pool industry, he had never known of an old cover to be sold when replaced by a new one, as covers are replaced because they are no longer fit for purpose.

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[7] 11 months passed from when the cover was taken on 24.12.14 to Mr Watson's last day of work on 25.11.15

[25] Mr Smith accepted that he was at the company premises when the cover was collected but that he did not know who Mr Watson was talking to. He said Mr Watson did not ask permission to take the cover, and that because of that and the asset being a useful asset, the decision was made to issue the invoice. Mr Smith said that the invoice was put it on Mr Watson's work clipboard, with work documents and payslips.

[26] I am not satisfied that Mr Watson's liability for the cost of the cover is established to the requisite standard of proof, being the balance of probabilities. The invoice refers to the cover as second hand and being "given away" and yet charges what Mr Smith says is the new price for the cover.

[27] Also, it seems unlikely where a staff member had without permission taken something which the business regarded as a useful asset, that there would be no discussion about it, or request for return, but rather an invoice for the full price issued.

[28] Although the invoice sum of $575 is not insignificant, there is no evidence of any attempt to follow up with Mr Watson regarding payment in the almost one year that he remained working for the company. There is no reference in the 18 November 2015 letter following the notice of resignation, to the pool cover or invoice. The letter includes requests for some notes Mr Watson was to provide and reference to the deduction of the cost of the course.

[29] The sum of $360 should therefore not have been deducted from Mr Watson's final pay, and must be paid by Poolcare to him.

Wet Weather Gear

[30] By the letter of 18 November 2015, Poolcare had referred Mr Watson to cl 19D in the employment agreement.

[31] Poolcare then deducted $30 from Mr Watson's final pay for replacement of his wet weather gear, which it described as covered in glue. The company sent in photos to the Authority which supported the claim of patches of glue on the gear.

[32] At the case management conference Mr Smith advised that the cost was actually considerably more than $30 but because Mr Watson had had the overalls for a while, a lesser amount was charged.

[33] Mr Watson stated that he was not present when the wet weather gear was inspected and could not say whether the photos showed how the gear was when received. He did wear the wet weather gear when handling chemicals as personal protection equipment and therefore it is likely that there was some wear and tear as would be expected when working with chemicals. Mr Watson offered no explanation of the presence of glue on the gear, nor any comment on the cost of the gear.

[34] Mr Smith stated that Poolcare had six other employees and their wet weather gear was not in this condition. Further, he said that the gear is not personal protective gear, but wet proof clothing to help keep employees dry when they are required to work in wet conditions. The $30 sum was said to be less than half of the cost of the replacement.

[35] I am not satisfied that the state of the overalls on their return can be explained by fair wear and tear in the job of dealing with swimming pools. Therefore, under clause 19D of the employment agreement Poolcare was entitled to make a deduction. There was no challenge by Mr Watson to the cost of the gear, and I find that the amount of $30 came within what Poolcare was entitled to deduct.

Costs

[36] Mr Watson is awarded $71.56 against Poolcare for the cost of the filing fee in this proceeding.

Nicola Craig
Member of the Employment Relations Authority