

*Under the Employment Relations Act 2000***BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN Williams Hickman Electrical Limited (Applicant)
AND Brian Gower (Respondent)
REPRESENTATIVES Ray Williams on behalf of the applicant
No appearance for respondent
MEMBER OF AUTHORITY Helen Doyle
INVESTIGATION MEETING 21 December 2004
DATE OF DETERMINATION 25 January 2005

DETERMINATION OF THE AUTHORITY

[1] The applicant, Williams Hickman Electrical Limited (Williams Hickman), seeks to recover from the respondent, Brian Gower the sum of \$947.44 being two weeks wages less holiday pay in accordance with clause 12 of the individual employment agreement between the parties.

[2] The respondent in its statement in reply says that he did not fail to give proper notice, or, that if he did, the employer suffered no loss thereby and that enforcement of a provision requiring forfeiture of wages would be harsh and oppressive.

[3] There was no appearance at the investigation meeting by or on behalf of Mr Gower. I am satisfied that Mr Gower was served with a copy of the notice of investigation meeting. The non-appearance of Mr Gower was not altogether unexpected. There was a telephone conference held with the Authority about this matter on 4 November 2004 to arrange a date for the investigation meeting. Mr Gower's solicitor, Graham Malone, participated in the conference call. Mr Gower had, prior to the telephone conference, provided an affidavit. Mr Malone made it clear that Mr Gower's view was that there was no further evidence he wanted to give and that Mr Gower did not want to travel to Christchurch from where he was based in Nelson. Mr Gower deposed in his affidavit that he was aware that he was entitled to hear the applicant's evidence and waived that right.

[4] I proceeded to hear evidence from Ray Williams who is the sole director of Williams Hickman at the investigation meeting. I questioned Mr Williams on some of the matters contained within Mr Gower's affidavit. At the conclusion of the meeting I wrote to Mr Gower to advise him that there was nothing arising from the evidence that was not already before the Authority by way of statement of problem, statement in reply, affidavit and the documents provided. I advised him that I had reserved my determination and would issue a determination in the New Year.



The background

[5] Mr Gower commenced employment with Williams Hickman in late September 2003 as an electrician. Williams Hickman is a company involved in the business of electrical servicing and electrical contracting. Mr Gower was party to an individual employment agreement with Williams Hickman which he signed on 19 September 2003 and Mr Williams on behalf of the company signed on 22 September 2003.

[6] For the purposes of this matter the material clause in the employment agreement is:

12. TERMINATION

To terminate this Contract, the parties may mutually agree upon termination, or alternatively two weeks notice in writing may be given by either party. Where two weeks notice of termination is not given, two weeks salary shall be paid or forfeited as the case may be.

Where the Contract is terminated by either party without the required notice, neither party shall be obliged to pay more than the equivalent of two weeks salary in lieu of notice.

Where misconduct by the Employee has been established, the Employer may summarily terminate this Contract by providing the Employee advice to that effect in writing.

If the Employee is absent from work for more than two (2) consecutive working days without notification to the Employer, this Contract shall be deemed to be terminated.

The Employee shall in the event of termination of the agreement have deducted from their final pay the cost of any unreturned clothing, protective clothing and/or tools, or other debts owing to the employer.

Under the heading Other Provisions there is an unnumbered clause that provides:

I agree, in the event of termination of my employment to the deduction from my final pay for any unreturned clothing, protective clothing and/or tools, or other debt owing to the company, whatsoever it may be.

[7] Mr Gower had taken some leave from 2 December 2003 to have an operation on his knee. He understood that he would be off work for about 2-6 weeks and advised his employer. Mr Williams said in his evidence that he thought Mr Gower would return to work in about 2-3 weeks.

[8] On or about 12 December a cardboard box was delivered to the premises of Williams Hickman. It contained some company equipment which had been in Mr Gower's possession and a letter dated 12 December which provided:

Dear Alan,

You might have guessed what this letter is going to say from the contents of the box it was packed in.

The fact is, that since I last spoke to you my domestic situation has changed considerably. It is of a very personal nature and that is why I feel I had to write to you instead of talking to you face to face, or over the phone.

I do not want to go into detail, but as a result of these changes I will be going to stay with my parents for the foreseeable future and will therefore not be able to continue working for the company for some time (if at all).

I am very sorry to spring this on you at such short notice, and hope you will understand, even though I have not explained myself very well.

I would just like to say that I have been very happy working for Williams Hickman, & it is very ironic that after working for some crap companies & then finding a good one (you lot!) I am then put in the position of having to leave under these circumstances.

I have enclosed all the things you have given me, & hope I haven't forgotten anything.

Give my regards to everyone (you have a good bunch there) & hope you have a good Christmas.

Many thanks

B Gower

[9] Mr Williams said that he had expected Mr Gower to return to work and was quite shocked to receive the letter as there had been no previous indication that things were not all right with Mr Gower.

[10] Mr Williams said that he was not able to immediately contact Mr Gower as Mr Gower's landline was disconnected. Mr Williams did manage to obtain a telephone number for Mr Gower's parents in Nelson and telephoned Mr Gower later in December 2003 at that number. Mr Williams said that he could not recall Mr Gower mentioning sickness during the telephone call. Mr Gower said in his affidavit that he did state during the telephone call that he would not have been able to return to work within the two week period when the failure to give two weeks notice was referred to by Mr Williams during the telephone conversation. There was a suggestion by Mr Williams that Mr Gower return to work out his notice but this suggestion was not accepted by Mr Gower. Mr Gower understood that Mr Williams intended to pursue the matter but was hopeful that he would not. Mr Williams understood from the conversation that Mr Gower was expecting to be requested to pay the two weeks wages.

[11] Mr Williams duly sent a demand notice to Mr Gower on 15 January 2004 for the sum of \$947.44.

[12] Payment was not made in accordance with the demand and nothing happened until 13 April when Mr Gower wrote to Mr Williams to notify him of a personal grievance for an unreasonable demand for two weeks wages. He referred in that letter to his sickness and inability to work. Mr Williams said that was the first time the issue of sickness was raised by Mr Gower.

[13] There was some further correspondence between the parties representatives.

[14] The parties participated in mediation but the matter was unable to be resolved.

Determination

[15] Williams Hickman and Mr Gower did not mutually agree on termination of his employment.

[16] There was therefore a requirement for Mr Gower in terms of clause 12 of the employment agreement to give two weeks notice of termination. He returned to Williams Hickman a cardboard box of equipment with a letter advising that as a result of some changes he was going to stay with his parents for the foreseeable future and would not be able to continue working for the company for some time (if at all). Williams Hickman understood and I find reasonably that Mr Gower's employment would be terminating that day. In those circumstances I do not find that Mr Gower gave Williams Hickman proper notice in accordance with clause 12 of his employment agreement.

[17] Mr Williams, on behalf of the applicant, sought to recover from Mr Gower two weeks salary in lieu of notice less holiday pay deducted from the wages in reliance on the provision in the employment agreement with respect to deduction from the final pay. Sections 4 and 5 of the Wages Protections Act 1983 would have prevented such a deduction from wages in the absence of the written provision in the employment agreement.

[18] I now turn to the legal question whether payment or forfeiture of two weeks wages in the absence of two weeks notice is an agreed genuine pre-estimate of damage or a penalty. I find the requirement to forfeit or to pay two weeks wages to be an agreed genuine pre-estimate of loss in the absence of two weeks notice being given by either party. The loss was reasonably quantified at two weeks and was not extravagant or unfair so as to be a penalty. In these circumstances I uphold what the parties have agreed to in clause 12 of the individual employment agreement in the event of a failure to give proper notice.

[19] Mr Gower said in his affidavit the reason there was no termination date provided in his letter to the applicant was that he was incapable of returning to work and even if the clause was lawful it was unfair to exercise the demand in those circumstances. On 18 May 2004 Mr Malone provided some medical notes from Mr Gower's doctor and surgeon to support Mr Gower's position that he would not have been medically fit to return to work in any event even if notice had been given. The surgeon's notes reflect during a consultation on 16 December with Mr Gower that Mr Gower was making quite good progress and is feeling quite happy with his knee. The notes reflect that in the mean time Mr Gower should commence mobilisation and activities within the bounds of pain and swelling and his knee should slowly improve from this point. The documents were provided after Mr Gower resigned and Mr Gower did not refer to any incapacity to return to work in his letter of resignation which focused on his domestic situation as the reason for the termination of employment. I place in this case significant reliance on Mr Gower's own letter of 12 December which explains why he cannot return to work. There is no mention of incapacity or sickness. I do not find that it was unreasonable or unfair for Williams Hickman to enforce clause 12 of the employment agreement.

[20] Williams Hickman is entitled to an order that Mr Gower pay it two weeks wages less holiday pay as set out below:

Pay rate of \$16.50 per hour x 40 hours = \$ 660.00

\$660.00 x 2 weeks	\$1320.00
Less holiday pay of	<u>\$372.56</u>
(6% of gross wages of \$6209.38)	\$947.44

[21] I order Brian Gower to pay to Williams Hickman Electrical Limited the sum of \$947.44 being two weeks wages less holiday pay as deducted.

Costs

[22] Mr Williams seeks some contribution toward the cost to the company for the time that he has had to put into this matter. He has sought 17 hours at \$50.00 per hour although 3 hours of that was related to mediation when costs are not normally awarded in any event. Mr Williams is the sole director of Williams Hickman. I am of the view that a small award reflective of the executive time of Mr Williams when he could have been productive on other matters is in order. (*Open Systems Limited v Pontifex* [1995] 2 ERNZ 211). The expenses which I find are directly related to this matter are in respect of the preparation of the statement of problem, related attendance on a conference call, preparation for the investigation meeting and attendance at the meeting. I find a fair and reasonable award for executive time would be the sum of \$100.00 together with reimbursement of the \$70.00 filing fee.

[23] I order Brian Gower pay to Williams Hickman Electrical Limited the sum of \$170.00 being expenses and filing fee.



Helen Doyle
Member of Employment Relations Authority

