

Attention is drawn to paragraph [3] of the Authority's determination dated 12 April 2005, CA 47/05, prohibiting publication of certain information contained in this determination.

Determination Number: CA 47A/05
File Number: CEA 239/04

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH OFFICE**

BETWEEN A (Applicant)
AND R (Respondent)
REPRESENTATIVES The applicant in person
Karen Castiglione, Counsel for Respondent
MEMBER OF AUTHORITY James Crichton
FURTHER INFORMATION AND SUBMISSIONS 29 June and 1 July 2005 from the applicant
18 May and 24 June 2005 from the respondent
DATE OF DETERMINATION 14 July 2005

SUPPLEMENTARY DETERMINATION OF THE AUTHORITY

Introduction

[1] In my substantive determination on the employment relationship problem between these parties dated 12 April 2005, I noted at paragraph [61] that I was not offered any evidence of a wage loss and was accordingly not in a position to consider that aspect in my determination.

[2] The applicant in these proceedings appeared for himself and in a subsequent approach to the Authority after the issue of the determination, indicated that he had misunderstood the observations that I made at the commencement of the meeting and as a consequence, had not offered evidence in respect to the loss of wages.

[3] As equity and good conscience requires that that misunderstanding not impact harshly on the applicant, I have indicated to the parties representatives that I would consider that matter and I invited them to make written submissions to me in that regard.

[4] The matter of costs is also outstanding and I deal with that issue as well in this supplementary determination.

Lost wages

[5] Section 123 of the Act confers a discretionary power on the Authority to reimburse an employee lost wages (in whole or in part) as a remedy for a successful personal grievance.

[6] Mr A has been successful in his claim that he was unjustifiably dismissed but his own behaviour was such that I determined the contributory figure at 66 per cent.

[7] It follows that were I to be satisfied that Mr A had lost wages *as a result of the grievance* I should apply a similar percentage to recognise Mr A's own contribution to the dismissal events.

[8] I have carefully considered the material that has been provided to me by both Mr A and counsel for the respondent. Having reflected on that material at some length, I am not persuaded that I can safely identify any amount which Mr A can say is his actual loss in respect to wages.

[9] A plethora of documents have been provided to me and the relevance or otherwise of them has been the subject of debate between the parties. Mr A himself advances two separate figures for the money that he has earned since leaving the employment of the respondent.

[10] In addition, Mr A produces information pertaining to two bank accounts, one with Westpac and the other with the Southland Credit Union. The Westpac account is his girlfriend's account (or at least that is the evidence that he gave at the investigation meeting). What he says in his submission is that this is his bank account. If it is his bank account then he has no entitlement to lost wages because the wages sums being credited to that account are greater than he would have earned had he continued employment with the respondent. If conversely, what he said at the investigation meeting is correct and what he is saying now is incorrect and the bank account is actually his girlfriends, then it is impossible to identify which income belongs to him and which income belongs to his girlfriend.

[11] The other information of a banking nature that is provided is a Southland Credit Union bank account. The information in respect to that bank account is incomplete. Mr A appears to have provided every second page and so it is impossible to identify what wages in total he has earned.

[12] Mr A has also provided a tax certificate from the Inland Revenue Department which he submits as evidence for his earnings for the tax year from 1 April 2004 to 31 March 2005. My difficulty with accepting this information at face value is that it appears inconsistent with the banking information or at least some of the banking information and it is not clear to me that the whole document from the IRD has been provided to the Authority.

[13] Two further matters go to Mr A's credibility generally. The first is confirmation of a matter which was referred to in the investigation meeting. It seems that Mr A is facing a charge of a breach of section 127 of the Social Security Act 1964 which is one of a group of sections of that Act dealing with what is referred to in the popular press as *benefit fraud*.

[14] The second issue which goes to Mr A's credibility is an allegation that the central qualification on which his curriculum vitae is based is in fact not a qualification that he holds at all. Mr A had an opportunity, in responding to the respondent's submissions on this matter, to object to their allegation and has chosen not to do so, so the Authority is entitled to reach the conclusion that the allegation is not denied.

[15] Given the confusion surrounding the information provided by Mr A in respect to his claim to have lost wages and sadly, the issues concerning his honesty, I find I do not have credible information on which to make a reasoned judgement as to any loss of wages that Mr A may have suffered and in consequence, I exercise my discretion and do not award any lost wages to Mr A.

Costs

[16] In the substantive determination dated 12 April 2005, I reserved costs. The parties being unable to settle that matter between themselves, the Authority has been asked to resolve the question.

[17] The usual principle of course is that costs follow the event and given that Mr A was successful (albeit in a modest way) in principle he is entitled to seek costs against the respondent.

[18] For its part, the respondent draws my attention to a calderbank letter dated 10 December 2004. A copy of that calderbank letter has been provided to me. Given that the applicant acted for himself in this matter, the letter carefully and thoroughly sets out the nature of the letter and the possible consequences to Mr A if he were not to accept it. I am satisfied that the letter could not be clearer.

[19] For his part, Mr A says that the reason that he did not accept the offer was because it failed to take account of wages. Be that as it may, clearly the observations that he makes as to why he did not accept the offer made clear that he received it and turned his mind to it.

[20] The calderbank offer is in the sum of \$1,635.00 being a month's pay for Mr A but on this occasion paid as a tax free amount.

[21] Mr A's only success in this proceeding was to be awarded a compensatory sum of \$1,000.00 so the calderbank letter amount was clearly a larger sum than he was awarded. It follows that the calderbank principles are activated.

[22] The respondent tells me that they have incurred costs of \$7,640.00 exclusive of GST and disbursements of approximately \$700 on top of that sum. The matter was dealt with in a two day investigation meeting so on the face of it, the fees rendered to the respondent might seem a little high given the indicative rule of thumb of perhaps \$1,500.00 a day in costs.

[23] However, I am satisfied that the fees rendered to the respondent by their counsel are fair and reasonable because of the extraordinary nature of the proceedings mounted by Mr A. I accept the respondent's submission that Mr A raised a variety of more or less outrageous claims in the course of prosecuting his personal grievance and while I found for him in relation to his claim for unjustifiable dismissal none of his other various claims received any credence at all. Indeed many were so obviously wanting in form or substance or both that I was able to strike them out during the course of the investigation meeting.

[24] Notwithstanding all of that, the respondent was of course put to the trouble of having to prepare to defend the allegations and in my opinion they did so honourably, fairly and thoroughly.

[25] In principle then, I accept that the respondent is entitled to a contribution to its costs from Mr A and they seek a contribution of *at least* \$3000.

[26] There is however little practical point in the Authority making an order against Mr A if there is no realistic prospect of him being able to meet that obligation.

[27] I think the respondent is entitled to a contribution given the nature of the proceedings and the calderbank offer which the respondent made prior to the investigation meeting. However, given Mr A's age and the uncertainty he has managed to create about just what his income actually is since the termination of his employment, I think only a modest award can be contemplated.

[28] I direct that Mr A pay the respondent the sum of \$500 as a contribution to the respondent's costs.

James Crichton
Member of Employment Relations Authority