

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN Gillian Buchanan (First Applicant)
AND Lynn Symes (Second Applicant)

AND Inland Revenue Department (Respondent)

REPRESENTATIVES G Dewar for the Applicants
A Couch for the Respondent

MEMBER OF AUTHORITY G J Wood

INVESTIGATION By way of submissions received by 4 March 2005
MEETING
DATE OF 21 March 2005
DETERMINATION

DETERMINATION OF THE AUTHORITY

The Issues for Determination

1. There are three matters at issue between the parties in relation to the applications before the Authority, which all relate to the dismissal of the applicants by the respondent (the IRD). The Authority must deal with the issues of monetary remedies and costs in respect of the original claim for unjustified dismissal (WEA549 & 550/03), plus a new application for the applicants to be fully reinstated to their old jobs (WEA.16/05).

Background

2. On 21 July 2003 the applicants were summarily dismissed by the IRD. A three day investigation meeting into the dismissals concluded on 9 August 2004. In my substantive determination, dated 18 August, I ordered the reinstatement of the applicants within 14 days of the date of determination, because of disparity of treatment with other IRD workers, even though the dismissals could otherwise have been justified, and reserved other remedies for submissions. The IRD challenged that

determination in the Employment Court and the applicants issued a cross-challenge in respect of some matters.

3. Because of the challenge to the Court, the parties, with the assistance of another Authority member, agreed on 31 August on the terms of a consent order, which acted as a partial stay on the order of reinstatement. In effect the applicants were placed on garden leave.
4. The Employment Court, in its judgment of 16 December, found that the activities engaged in by the applicants could not amount to serious misconduct, as well as upholding the Authority's determination that there was disparity of treatment. The Court therefore upheld the Authority's order that the applicants be reinstated and held that it "*should now be given full effect*". The Court also referred to the issue of monetary remedies, which was still with the Authority.
5. The Court also held that "*the parties should, without delay, enlist the services of a mediator with a view to reaching agreement on these issues*". I immediately approached the parties and reminded them of the Court's recommendation. However, all parties were adamant that further mediation would not be constructive in this matter. Given the history of the matter to date I determined not to require further mediation.
6. The applicants now wish to be returned to full working duties and to be able to attend their normal workplace. This has been resisted by the IRD. Accordingly, an application was filed to set aside the consent order made on 31 August. This application was followed by an amended statement of problem applying for a compliance order to give effect to the determination of the Authority dated 18 August 2004, i.e. to fully reinstate the two applicants to work.

Remedies (WEA549 & 550/03)

7. The Employment Court set out the following passage, at paragraph 47, on reimbursement and compensation, for the benefit of the Authority:

"The Authority may think that it is under this last head that the bulk of the reduction ought to be made, as it is not readily open to the employees to assert an injury to their dignity when they have not been as diligent as they ought to have been in becoming familiar with the code of conduct."

8. I consider first whether the applicants properly mitigated the remuneration they lost. It was claimed on behalf of the applicants that they sought reinstatement throughout and therefore there was no need for them to seek alternative employment. This is not an accurate statement of the facts. This matter was first referred to the Authority on 23 December 2003, after the applicants had already been dismissed for five months. While one of the applicants had attended mediation before then (and it was appropriate for her to take that course), there were never any applications made for interim reinstatement. The statements of problem filed with the Authority did not seek either reinstatement or urgency. I accept, however, that the applicants had originally sought reinstatement and that the IRD had no reason to believe otherwise until the filing of claims with the Authority.
9. Both applicants confirmed in evidence that at the time they filed with the Authority they were very angry and no longer sought reinstatement, but changed their minds subsequently.
10. It was not until 11 June 2004 that the IRD and the Authority were made aware that reinstatement was now being claimed in the Authority. To its credit, the IRD did not object to that amendment to the statements of problem.
11. As neither of the applicants was made aware that they were required to mitigate their loss in any way, Ms Symes spent the time supporting her mother; while Ms Buchanan kept very busy helping other people. As she was terrified of interviews, she did not apply for any jobs.
12. This evidence shows that while the applicants did initially seek reinstatement, they no longer wished to be reinstated as at 22 December 2003, and it was not until 11 June 2004 that the Authority or the IRD knew of their change of view.
13. Given the fact that the applicants made no attempt whatsoever to mitigate their losses during the period when they were not seeking reinstatement, it follows that they can not claim reimbursement for that period.
14. The matter is different, however, in respect of the first five months after their dismissal and the period between 11 June 2004 and when their remuneration

recommended, when reinstatement was being sought. This is because the applicants could not be expected to take on permanent employment while their claims for reinstatement were on an active footing (*Yukich v Carter Holt Harvey Ltd* unreported, Colgan J, 16 February 2004, AC 6/04 applied).

15. I therefore determine that the applicants are eligible for reimbursement of lost remuneration for the two periods specified above, subject to issues of contribution.

16. The applicants also seek compensation for the loss of their jobs. Here I take account of the Court's judgment that no fair and reasonable employer could conclude that they had committed serious misconduct. On the other hand I also take account of its findings in paragraph 47, set out in part above. Thus the applicants' failure to digest IRD's requirements, despite training and reminders, is particularly relevant. The fact that the applicants were long-serving, hard working and loyal members of the IRD is also important.

17. I accept the applicants' evidence that they have found it difficult to deal with the impacts of their dismissals. However, they have been granted re-instatement. Otherwise the awards for compensation which I deem appropriate, of \$12,500 each, subject to contribution, would have been higher.

18. The findings of the Court referred to above certainly highlight the key issue in terms of contribution in this case. On the other hand, the applicants were not responsible for the finding of serious misconduct despite acceptance of the applicants' explanations, nor the disparity of treatment which occurred. I therefore consider that a reduction of one fifth to the awards of reimbursement and compensation is appropriate.

Costs (WEA 549 & 550/03)

19. I turn now to the issue of costs. A contribution of two thirds towards the applicants' costs of \$24,191.50 for the original investigation meeting was sought. The IRD considered an appropriate award of costs would be in the order of \$3,000.

20. This was a case similar to many before the Authority, but for two clear exceptions. First, there were issues relating to the availability of one witness, but both parties

have to bear some responsibility for the difficulties that arose there. Second, it was clear to the Authority and the applicants, from a conference call held on 26 February 2004, that the IRD was to prepare a table covering employees who had been caught accessing family names by the internal audit process, and the outcome in each case. However, due to a genuine misunderstanding, this table was not prepared until after the initial first two days of the investigation meeting. This necessarily added to costs. The IRD should therefore meet some of those additional costs.

21. In all the circumstances of this case I consider that a contribution of \$7,500 towards the applicants' costs in total is appropriate, and so order.

Full Reinstatement (WEA16/05)

22. I turn now to the issue of reinstatement. However the issue might be presented in a legal context, what the applicants want to do is to return from garden leave to full duties. At issue is the meaning of the consent order where it states:

“These variations to the order for reinstatement shall remain in effect until the current proceedings between the parties have been finally determined.”

23. The applicants also rely on the finding of the Employment Court that the Authority's order for reinstatement should now be given full effect. What I have to determine is whether or not the consent order is still of any effect. If I find that it is I must also determine whether the Authority has the jurisdiction to implement the Court's findings, which were made, I am advised, in ignorance of the consent order.

24. The consent order is clear enough on its terms. It was made in the knowledge that the Authority's determination was being challenged in the Employment Court. However, it did not limit the terms of the order to the challenge in the Employment Court. The actual words agreed on were *“until the current proceedings ... have been finally determined”*. The current proceedings referred to are the proceedings between Ms Symes and Ms Buchanan and the IRD. They are about employment relationship problems that arose from the applicants' dismissal and they will not be finally determined until every avenue of appeal has been exhausted or abandoned. That is clearly not the case here as leave to appeal to the Court of Appeal is being actively pursued.

25. It appears that the Court intended that the applicants be immediately reinstated, even if that decision was made without knowledge of the consent order. I make no determination about whether the Employment Court is bound by the consent order. That is a matter for the Court. However, in these particular circumstances I determine that the Authority does not have the jurisdiction to implement the Court's apparent intentions in the way desired by the applicants.

Conclusion

26. The applicants are therefore entitled to the following sums –

- Lost remuneration between the time of their dismissal and 23 December 2003, and between 11 June 2004 and when their remuneration recommenced (both less 20%);
- Compensation in the sum of \$10,000 each; and
- Costs in the sum of \$ 7,500 between them.

27. The applicants' application (WEA16/05) to be fully reinstated into their jobs is dismissed. Costs are reserved on that application, but it would appear to be in the interests of justice, at first blush at least, that costs should lie where they fall.

G J Wood
Member of Employment Relations Authority