New Zealand Employment Relations Authority Decisions

Estate of McEwing v Geovert Limited (Auckland) [2016] NZERA 634; [2016] NZERA Auckland 154 (20 May 2016)

Last Updated: 2 April 2017

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

[2016] NZERA Auckland 154
5461076

BETWEEN THE ESTATE OF STEVEN EDWARD McEWING (Deceased) Applicant

A N D GEOVERT LIMITED Respondent

Member of Authority: James Crichton

Representatives: Michael Smyth, Counsel for Applicant

Anthony Parish, Advocate for Respondent

Investigation Meeting: On the papers

Submissions Received: 11 March 2016 from Respondent

Date of Determination: 20 May 2016

THIRD DETERMINATION OF THE AUTHORITY

Introduction

[1] In my first determination in this matter issued on 26 February 2016 as [2016] NZERA Auckland 57, (the second determination), I traversed the late Mr McEwing's application for a reopening of a decision issued on 29 January 2015 by another Member of the Authority (the first determination).

[2] In my 26 February 2016 determination I decided that the Authority's investigation ought to be reopened both in respect of the issue of costs and in respect of the question of remedies.

[3] This present determination (the third determination) is concerned with the question of remedies. A subsequent determination will deal with the question of costs once the submissions of the parties are available.

[4] In the meantime, it is proper for me to record that the applicant in this matter, Mr McEwing, died on 20 April last but notwithstanding his passing, the uncompleted matters still need to be attended to.

[5] In my second determination, I declined to make definitive orders in respect of the late Mr McEwing's claims concerning remedies because I wanted to give the respondent (Geovert) the opportunity to respond directly to the material the late Mr McEwing had put before me and I discerned that it had not in fact done that in the submissions and other material that I then had access to.

[6] Geovert has now had that opportunity and I am able to dispose of the issue concerning remedies now.

The adequacy of the claim for compensation

[7] In the affidavit that was filed in support of Mr McEwing's claim for an uplift in the compensation that he was awarded in

the first determination, he says that the original Member who heard the matter wrongly attributed characteristics to him that actually applied to a co-worker who brought similar proceedings and who that Member dealt with contemporaneously.

[8] Mr McEwing then sets out in his affidavit what he considers to be the pertinent facts about the dismissal and the effects of that dismissal on him. Because that evidence is sworn testimony, I am satisfied that I can take it into account in considering whether the compensatory sum previously awarded by the Authority ought to be subject to an uplift.

[9] Mr McEwing makes the observation that the dismissal was so abrupt that he had no real opportunity to in any way prepare for it. On the day that he was dismissed for redundancy, he attended work as normal and expected to work the full day having no understanding that he would be dismissed but yet by lunchtime his position had been disestablished. Understandably, he refers to the dismissal as being akin to a summary dismissal although it was a dismissal for redundancy.

[10] There was a meeting on that last day and Mr McEwing makes the point that as he had no notice of that meeting, he was unable to have a support person present, that the meeting lasted barely 15 minutes and that the decision to *"lay him off"* must have

been made before the meeting took place because effectively there was no engagement between the parties as the law requires.

[11] Mr McEwing then goes on to explain how he told colleagues why he was packing up his personal property and he refers to the way that that aspect was dealt with in the first determination by criticising the original Member's conclusion that he somehow behaved inappropriately in telling his colleagues that he had been dismissed for redundancy.

[12] So far, as Mr McEwing helpfully concedes in his affidavit, the matters traversed are common to his experience of the redundancy and that of his workmate's experience. However, the following matters were unique to him and Mr McEwing maintains that the previous Member did not take them properly into account.

[13] The first of these aspects is the fact that Mr McEwing suffered from depression and his affidavit evidence is that the effect of the dismissal was to require him to go back to taking anti-depressants. I agree that is a relevant factor.

[14] The second of the unique factors is Mr McEwing's evidence that his new partner, at the time of his dismissal, spoke English as a second language and so the challenge of speaking to her about his dismissal was all the greater.

[15] The third aspect that was specific to Mr McEwing was that he had been unjustifiably dismissed before and he says that this exacerbated his distress.

[16] Finally, Mr McEwing maintains that the quantum of the award made both to him and to his co-worker was too low or, to put it another way, that the starting point that the Member used was too conservative.

[17] Taking those factors into account and considering the material supplied to me by Geovert which focuses exclusively on the alleged failure of Mr McEwing to mitigate his loss (and therefore bears not at all on the question of compensation for non-economic loss), I am satisfied that there ought to be an uplift in the compensation for non-economic loss provided to Mr McEwing and I direct that an additional compensatory payment of $2,500 be paid to Mr McEwing's estate as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act).

[18] Put shortly, I conclude that the Authority's first determination did not properly assess the differences between Mr McEwing and his co worker in respect to non economic loss and had it done so, it seems to me axiomatic that there would have been a differential between the two awards of compensation, and there was not. This is because, on the face of it, the same or a similar dismissal inflicted on both men at the same time could reasonably be expected to impact them differently if their circumstances were different, as we know them to be.

The claim for reimbursement of lost wages

[19] In his statement of problem, Mr McEwing claimed the sum of $9,615.38 gross which is the total amount that he lost in the period from the date of his dismissal down to the date he started in his new role on 13 January 2014 (five weeks in effect).

[20] Again, Mr McEwing's affidavit relies on the errors in the first determination as a basis for seeking to challenge the Authority's conclusions.

[21] In the result, in the first determination, no lost wages were awarded on the footing that the evidence did not support Mr McEwing making any attempts to mitigate his loss. That is certainly the basis on which Geovert resists any attempt by me to revisit the matter.

[22] Geovert says that the Authority heard the evidence from the parties at the time and the Member presiding then had the opportunity of forming a proper view of the evidence and that she formed the view that Mr McEwing had not mitigated his loss and therefore was not entitled to the effect of s.128 of the Act.

[23] The Authority appears to have concluded that because Mr McEwing apparently did not mitigate his loss, he was not entitled to the benefit of that section but with respect to the earlier decision of the Authority, that is not consistent with the evidence.

[24] According to the brief of evidence put in by Mr McEwing for the original hearing of the matter and which he repeats the thrust of, in his affidavit evidence before me, he did in fact seek an alternative position immediately after the dismissal for redundancy. However, he makes the point, entirely correctly, that at that time of the year (mid-November) businesses were not engaging staff because of the effect of taking on new staff immediately prior to the Christmas period and so he was unable to

find any position that he might aspire to and so was unable to put before the Authority any evidence that he had so much as a job interview at the time.

[25] But his evidence is clear that he did take steps and as a matter of fact was offered a position around Christmas time, a position which he accepted and which he commenced work in on and from 13 January 2014. On that footing, I do not agree with the conclusion reached in the first determination that there was no attempt to mitigate loss.

[26] But that is not an end to the matter. While the presiding Member found, in the first determination, that Mr McEwing had been unjustifiably dismissed she also concluded that the redundancy was itself genuine. That being the case, there can be no entitlement to lost wages for that reason because the wages were lost as a consequence of a genuine redundancy, albeit one with an unsatisfactory process and thus there can be no entitlement to lost wages if the job was lost in a genuine retrenchment.

Determination

[27] I am satisfied that the first determination of the Authority contained an error and as a consequence I make the following order:

(a) There will be an additional payment of $2,500 as compensation under s.123(1)(c)(i) of the Employment Relations Act 2000 by Geovert Limited to the estate of Mr McEwing.

[28] There is no order in respect to lost wages because no wages are lost, at law, where the redundancy is found to be genuine.

James Crichton

Chief of the Employment Relations Authority
