

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Kirk Kahi Kirkwood (Applicant)
AND On Gas Limited (Respondent)
REPRESENTATIVES Samuel Hood, counsel for applicant
Karen Spackman, counsel for respondent
MEMBER OF AUTHORITY Alastair Dumbleton
COSTS SUBMISSIONS 8 November and 3 December 2004
RECEIVED
DATE OF DETERMINATION 9 February 2005

DETERMINATION OF THE AUTHORITY AS TO COSTS

[1] At the end of its substantive determination dated 1 November 2004 (issued under AA 351/04) resolving this claim of unjustified dismissal, the Authority reserved the question of costs. The parties and their representatives made attempts to reach agreement on the question but on 3 December 2004 indicated they had not been successful and sought orders accordingly.

[2] I found that the dismissal of Mr Kirk by On Gas Ltd was unjustified, though not through lack of grounds for the employer taking that action but through the absence of fairness in relation to a particular aspect of the inquiry conducted by On Gas before it decided to dismiss. I found that after its inquiry the employer was reasonably able to believe that Mr Kirk had attended work while affected by alcohol to an extent that he could not work productively or safely. Further I found that before he was taken home Mr Kirk had worked or attempted to work as he normally did with hazardous goods. However I also found that the employer unreasonably held Mr Kirk to account for earlier alleged misconduct of a similar kind which at the time it did nothing about and indeed accepted the explanation he gave then for his conduct.

[3] For the purposes of assessing under s.124 of the Employment Relations Act 2000 whether Mr Kirk had been at fault and had thereby contributed to the situation that had given rise to his unjustified dismissal grievance, I made a direct finding from the evidence that Mr Kirk had in all probability been drunk at work and had also worked in that condition. I assessed that he was 80% to blame for what had happened that culminated in his unjustified dismissal. As a result his request for reinstatement was declined and his monetary awards were heavily reduced. He received \$1,070 for lost wages and \$1,200 for hurt feelings and humiliation.

[4] Mr Kirk has sought a relatively moderate sum as a reasonable contribution to legal costs and expenses - \$2,260 for the former and \$279 for the latter. He expended about \$3,800 of legal aid money granted to him by the Legal Services Agency. It appears however that he rejected a settlement offer from the employer that would have left him considerably better off than the

Authority awards have, even after paying back the legal aid grant. It seems he declined an offer of about \$12,000, a situation which may cause the Agency concern if it aware of it this aspect of the case.

[5] For its part On Gas submits that costs should lie where they fall.

[6] I do not think that justice will be served by awarding Mr Kirk costs. Given the size of the settlement he was offered but rejected, he is lucky not to be ordered to contribute to the employers costs. Only the fact that he was legally aided and the fact that the without prejudice settlement offer from On Gas was not qualified as being made “save as to costs”, stops me from making an award against him. This was a claim lacking in merit. As others could plainly see, Mr Kirk arrived at his job drunk and started doing some work. In doing so he risked not only his own safety but that of his co-workers and also members of the public travelling on the roads where the employers dangerous goods are carried by it. Given the overall result, an award of costs to Mr Kirk would be quite unjust.

[7] No order for costs is made.

A Dumbleton
Member of Employment Relations Authority