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McKendry v Jansen and anor [2011] NZERA 123; [2011] NZERA Christchurch 21 (3 February 2011)

New Zealand Employment Relations Authority

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McKendry v Jansen and anor [2011] NZERA 123 (3 February 2011); [2011] NZERA Christchurch 21

Last Updated: 9 June 2011

IN THE EMPLOYMENT RELATIONS AUTHORITY CHRISTCHURCH

[2011] NZERA Christchurch 21
5166673

BETWEEN JANE JOYCE McKENDRY

Applicant

A N D JANINE JANSEN and COLIN

PROUTING Respondents

Member of Authority: Representatives:

Submissions Received:

Philip Cheyne

Bob Gillanders, Representative for Applicant Jay Lovely, Counsel for Respondent

13 January and 1 February 2011 from the Applicant 31 January 2011 from the Respondent

Determination:

3 February 2011

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In earlier determinations I upheld Ms McKendry's personal grievance claim, awarded her compensation for lost remuneration of a sum to be quantified by the parties, reserved for later determination her claim for compensation for lost benefits being the loss of paid parental leave, referred to the Employment Court a question of law as to whether the Authority could compensate her for that loss and, having received the judgment of the Court confirming jurisdiction, ordered the respondent to compensate her for that lost benefit.

[2] This determination deals with two issues. First, it appears that the parties have not been able to agree on the quantum of lost remuneration ordered payable in the first determination. Second, costs in respect of the entire litigation before the Authority must be determined.

Lost Remuneration

[3] In the determination dated 3 August 2010 I awarded Ms McKendry compensation for lost remuneration and explained how the sum payable should be calculated with leave reserved in case of any difficulty with the calculations. I will not repeat here what was said in the earlier determination but I am referring to paragraphs [39] and [42].

[4] The wages records show that Ms McKendry received pay in lieu of notice through to the week ending 7 May 2009. In accordance with the earlier order that is the starting point for the assessment of lost remuneration. Ms McKendry finished her subsequent employment to go on parental leave on 11 August 2009. That period slightly exceeds the three months referred to in [s. 128\(2\)](#) of the [Employment Relations Act 2000](#) but there is no reason to limit the assessment to three months (13 weeks). The relevant period is therefore thirteen weeks five days (13.7 weeks). Ms McKendry's average weekly wage in the four weeks before she was given notice was \$206.31. That gives an assessed loss of \$2826.45. From that must be deducted her earnings from other employment which amounted to \$2044.14. That gives a loss of \$782.31 (gross) for which Ms McKendry must be compensated.

[5] I am asked to reduce the compensation award due to Ms McKendry's contribution to the grievance. I do not accept that Ms McKendry contributed in a blameworthy way to the circumstances of her personal grievance. She was dismissed for redundancy and the grievance arose because of the respondent's complete failure to comply with the requirements of the employment agreement in such circumstances. Ms McKendry did not contribute to that at all, much less in any blameworthy manner.

Costs

[6] All I have from Ms McKendry's representative is a brief email asking for an award of costs based on the assertions that the respondents made no genuine attempt to settle the matter at mediation and that their counsel endeavoured to obfuscate matters thus prolonging the litigation. Naturally enough the respondents' counsel referred to events at mediation to refute the assertions.

[7] A claim for costs must at the very least include the details of the legal costs actually incurred by the claimant. Helpfully there will also be an attempt to justify the sum claimed by referring to the relevant legal principles and the circumstances of the particular case. There should be no mention of what took place in mediation or any without prejudice negotiations. The sole exception is when there has been a *Calderbank* offer.

[8] This claim for cost does not meet the minimum requirement of telling me what costs were incurred. I am not willing to make any order of costs in favour of Ms McKendry on the basis of the information in front of me.

[9] Ms McKendry through her representative has had a fair opportunity to detail any claim for costs and it is now time to bring these proceedings to an end.

[10] There will be no order for costs in relation to the Authority's proceedings.

Orders

[11] The respondents are to pay Ms McKendry compensation of \$782.31 (gross) pursuant to [s.123\(1\)\(b\)](#) and [s.128\(3\)](#) of the Act.

Philip Cheyne
Member of the Employment Relations Authority

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