

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2016] NZERA Auckland 57  
5461076

BETWEEN            STEVE McEWING  
                                 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:    20 November 2015 from Applicant  
                                 22 January 2016 from Respondent  
  
Date of Determination:    26 February 2016

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**DETERMINATION OF THE AUTHORITY**

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**Introduction**

[1] Mr McEwing seeks a reopening of the Authority's investigation which resulted in its determination of 29 January 2015 in respect of the remedies awarded to Mr McEwing in the 29 January 2015 determination (the first determination) and in respect of the timetable for exchanging costs memoranda.

[2] The first determination issued on 29 January 2015, by common consent, contained a number of factual errors on its face. Those factual errors are set out in detail in Mr McEwing's application to reopen and it is unnecessary for me to recite them here.

[3] Counsel for Mr McEwing promptly contacted the Auckland office of the Authority after seeing the first determination and was told by an Authority Officer

that the first determination would be recalled and would not be published beyond its provision to the parties.

[4] Mr McEwing caused his counsel to complain to the Chief of the Authority about the quality of the first determination and that letter was written on 3 February 2015. In the reply from the Chief of the Authority, it was noted that Mr McEwing could seek a reopening if he chose to.

[5] A draft determination with corrections issued in March 2015 which, as was foreshadowed in the letter from the Chief of the Authority, persevered with the Authority's original decision while attending to the factual errors identified.

[6] Then by minute dated 20 April 2015, the Authority issued its second determination. Like the first determination, the second determination was dated 29 January 2015. The effect of this date was to make it impossible for Mr McEwing to seek a costs award because the timetable for the exchange of memoranda on costs reflected dates that had long since passed.

### **Determination**

[7] Mr McEwing seeks a reopening in respect of the ability to deal with costs and in respect of remedies.

[8] I turn first to consider the question of remedies and in that regard I have before me an affidavit from Mr McEwing which deals with that subject matter.

[9] There are two aspects to the remedies issue that are dealt with by the affidavit and expanded on in the submissions filed for Mr McEwing. The first is concerned with Mr McEwing's claim for reimbursement of lost wages and the second concerns the adequacy or otherwise of the compensation awarded.

[10] Dealing first with the reimbursement of wages, Mr McEwing's submission is that he ought to have been awarded \$9,615.38 by virtue of the effect of s.128 of the Employment Relations Act 2000 (the Act). That section simply creates a power for the Authority to award to a successful grievant the lesser of the sum lost in wages because of the dismissal or three months' ordinary time remuneration.

[11] Mr McEwing says that he should have been awarded the sum claimed, as of right, while Geovert Limited (Geovert) maintains that the Member who heard the

matter at first instance formed the view that Mr McEwing had not sufficiently mitigated his loss and was therefore not entitled to the lost wages sought.

[12] In respect of the issue of compensation, Mr McEwing maintains that in the Authority's original determination, the Member wrongly awarded to Mr McEwing a similar amount to another former employee of Geovert dismissed at the same time and in similar circumstances, and that Mr McEwing was entitled to more than his former colleague.

[13] Moreover, Mr McEwing maintains that because of the nature of the Member's factual findings about the insensitivity of the dismissal, the quantum of compensation ought to have been greater.

[14] I am satisfied on the material before me that in respect of the remedies issued it is appropriate for the Authority to reopen its investigation in order that the question of remedies can be readdressed. I decline to make orders in respect of the remedies issue now because I want to give Geovert the opportunity to respond directly to Mr McEwing's affidavit should it choose to.

[15] The affidavit is sworn evidence and is put before me to persuade me of the matters which Mr McEwing seeks a different outcome on.

[16] I would be failing in my duty if I proceeded to try to make some decisions on this aspect without giving Geovert an opportunity of responding by sworn affidavit to Mr McEwing's own affidavit.

[17] All I am prepared to do in the present determination is to allow the application to reopen so that the matter can be reinvestigated; I require nothing further from Mr McEwing because I have his affidavit and I am clear about the evidence that he is putting before me. I simply wish to give Geovert the opportunity of filing an affidavit in response and I will then make a decision on that aspect.

[18] It would assist me if Geovert could file such an affidavit within 14 days of the date of this determination; if there is no such affidavit filed within that timeframe, I will assume that Geovert does not wish to file such an affidavit and is happy for me to determine the matter on the basis of the material already before me.

[19] I turn now to consider the question of the costs matter. It seems to me very plain that Mr McEwing has suffered a miscarriage of justice in that, notwithstanding that he was the successful party in the original determination of the Authority, by dint of the process the Authority adopted in withdrawing one determination and substituting another some months apart but retaining the same date for both, the effect of maintaining the same date for the second determination was, in a practical sense, to deprive him of the ability to seek a costs order against Geovert.

[20] It cannot be fair or just for a successful party in a proceeding to be deprived of the right to pursue costs in the matter because of errors made by this Authority.

[21] In reaching the conclusion I do, I reject entirely the claim made for Geovert that Mr McEwing ought to have sought costs at the time that the first determination issued. That cannot be right; that first determination was withdrawn and subsequently replaced some months later.

[22] Even if, as Geovert seeks to maintain, there is some doubt about whether the first determination was in fact withdrawn, the fact that the second determination subsequently replaced it would seem to give the lie to any suggestion that the first determination somehow remained extant.

[23] But the short point is that I am satisfied on my own inquiries that Mr Smyth was told by an officer of the Authority that the first determination was being recalled, would not be published beyond the copy already provided to the parties and would be reissued in due course. Not only am I satisfied that that was what Mr Smyth was told, but I am also clear that the first determination never appeared on the Authority's website, was never provided to the library and so was subject to the very limited publication of only being given to the parties themselves. For a determination that does not contain any prohibition on publication, that is unprecedented and serves to confirm my conclusion that the first determination was indeed recalled.

[24] It follows from that conclusion that it cannot be right to expect Mr McEwing to have relied on the timeline in the first determination for the purposes of seeking an order for costs in his favour but not for any other purpose. Plainly the first determination was recalled and as a matter of law became a nullity until it was replaced by the second determination.

[25] In summary then, I make the following orders:

- (a) Geovert is to have 14 days from the date of this determination to file and serve an affidavit in response to Mr McEwing's affidavit and forthwith on the expiry of that 14 day period, I will then determine the live question of reimbursement of lost wages and quantum of compensation;
- (b) Mr McEwing is to have 28 days from the date of this determination to file and serve a memorandum as to costs and Geovert is to have 28 days from its receipt of that memorandum to file its response; and
- (c) I will deal with the costs order promptly thereafter.

James Crichton  
Chief of the Employment Relations Authority