

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Darcy Albon (applicant)
AND	Professional Garden Services Limited (respondent)
REPRESENTATIVES	The applicant represented himself Mark Skinner for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
INVESTIGATION	Wellington, 26 September 2006
DATE OF DETERMINATION	16 October 2006

DETERMINATION OF AUTHORITY

Employment Relationship Problem

1. In my substantive determination dated 29 November 2005 (WA 183/05) I found in favour of Mr Albon's claim that he had been unjustifiably dismissed. The Company was directed to pay to the applicant the following :
 - a. Lost wages – a sum equal to 11 weeks' ordinary time remuneration. That sum was to be reduced by the \$560.00 (five hundred and sixty dollars) earned by Mr

Albon during that period (the latter to be deducted from the gross calculation) and also by Mr Albon's 50% contributory fault. Determination of the actual figure was to be returned to the Authority if the parties could not reach agreement.

- b. Compensation for humiliation, etc – \$3,000 (three thousand dollars), to be reduced by Mr Albon's 50% contributory fault.

2. Costs were reserved.
3. As it happened, the parties were unable to reach agreement not only on a sum equivalent to the lost wages to be paid to Mr Albon, but also on a repayment regime as the respondent says it cannot afford to pay all that it owes to the applicant in one sum.
4. Because of the failure to reach agreement I directed that there be a further investigation on Tuesday 26 September 2006.

Discussion and Findings

5. At the investigation agreement was quickly reached by Mr Albon and, for the Company, by Mr Skinner, that the sum equivalent to the wages lost by the former was properly calculated in the following way:

The average wage earned by the applicant X 10 (taking account of the pattern of work), less tax, less \$560 earned by the applicant during the relevant period, less 50% contributory fault.

6. Mr Skinner disputed Mr Albon's claim that the average wage calculation should include an hourly attendance bonus of \$1.25. On reflection, I accepted the applicant's argument that, had he not been unjustifiably dismissed, he would have been eligible for that amount for the period of his lost wages.
7. By fax during the afternoon of the investigation day, Mr Skinner provided me with a copy of all of Mr Albon's earnings while employed by his Company, from 21 April

2004 until 30 August 2005. Mr Skinner also calculated the applicant's average gross weekly income as \$454.24: that calculation did not include the attendance bonus. Taking account of Mr Skinner's calculation of average gross weekly income and adding to it the attendance bonus, I am satisfied the average wage Mr Albon would have earned for the period lost to him as a result of his unjustified dismissal is \$504.24 gross.

8. Taking the above into account I am satisfied that the correct calculation of Mr Albon's lost earnings is as follows:

$$\$504.24 \text{ gross} \times 10 = \$5,042.4, - \$560 = \$4,482.4 - 50\% = \$2,241.2$$

9. I also sought and obtained the parties' agreement for me to talk to the Company's accountant, Mr Pat Sheehan, of Kendons Chartered Accountants Limited, Lower Hutt, about the respondent's ability to pay monies owed to the applicant. On 27 September 2006, by telephone, Mr Sheehan advised me that:

- The Company had an overdraft of \$12,500.
- The Company's overdraft limit was \$15,000.
- The Company had outstanding accounts to pay totalling \$4,500.
- The Company was owed \$42,000, of which he realistically expected it would recover 40% in the coming month.
- Mr Sheehan believed that the Company could therefore prudently commit itself to paying Mr Albon \$1,000 immediately, and the remainder by way of monthly payments of \$700 (i.e. it would pay the monies owed to the applicant within a 6-month period).

10. The advice was communicated to Messrs Albon and Skinner by telephone and/or letter on 27 September: ss. 160 & 173 of the Act applied. They were provided with 48-hours notice if they wished to dispute that information and the Authority's notice

that it intended acting on it. Some delay was experienced in communicating this information to Mr Albon.

11. At the investigation Mr Albon argued that, taking into account the Authority's 50% contributory fault finding against him, it was appropriate to seek half his legal costs, or \$970. That is a reasonable proposal I find, bearing in mind the costs legitimately incurred by the applicant in these proceedings.
12. I am therefore satisfied that it is appropriate to direct the respondent to make the following payments to the applicant by way of the following timetabling:
 - a. Lost wages: \$2,241.2 (two thousand, two hundred and forty-one dollars and 20 cents) gross; and
 - b. Compensation for humiliation, etc: \$1,500 (one thousand and five hundred dollars); and
 - c. Legal costs: \$970 (nine hundred and seventy dollars); and
 - d. Timetable: \$1,000 is to be paid to Mr Albon within 7 days of the date of this determination with the remaining \$3,711.2 being paid to him by way of monthly payments of \$700, the first being paid one month from the date of this determination and the remainder each month thereafter, except for the final monthly payment of the outstanding balance.

Determination

13. For the reasons set out above, I direct the respondent, Professional Garden Services Limited, to pay to the applicant, Mr Darcy Albon, by way of the timetable set out in paragraph 12 above, the sums set out in the same paragraph.

Denis Asher

Member of Employment Relations Authority