

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

CA 33/10
5162108

BETWEEN LAURIE JAMES BROWN
 Applicant

AND AVON PICTURE
 MOULDINGS LIMITED
 Respondent

Member of Authority: James Crichton

Representatives: Scott Fairclough, Counsel for Applicant
 Brian Nathan, Counsel for Respondent

Submissions Received: 5 February 2010 for Applicant
 22 January 2010 for Respondent

Determination: 15 February 2010

COSTS AND WAGE RECOVERY DETERMINATION OF THE AUTHORITY

The application

[1] By determination dated 17 December 2009, the Authority disposed of the employment relationship problem between these parties by determining that Mr Brown was justifiably dismissed from his employment on and from 8 May 2009. However, Mr Brown had made application for interim reinstatement after his dismissal on that date and was granted interim reinstatement by determination of the Authority dated 2 June 2009. Then, having been reinstated to his former position on an interim basis, he was dismissed for a second time on 23 June 2009 and by agreement between the parties, the alleged second unjustified dismissal and Mr Brown's substantive application were considered together and dealt with in the substantive determination of 17 December 2009.

[2] Costs were reserved in respect of both the initial interim application and the substantive hearing.

The claim for recovery of wages

[3] Mr Brown was dismissed first on 8 May 2009 but as a consequence of his successful interim application to the Authority, he was reinstated to his position with effect from that date. It follows that from that date down to the date of the issue of the final determination of the Authority on this matter, Mr Brown was paid gross wages totalling \$10,108.11. An undertaking was given in the usual terms, the effect of which was that on the basis that the dismissal was found to have been justified, Mr Brown stood ready to reimburse to the respondent (Avon) a sum equal to the amount paid to him over that period by Avon.

[4] Avon submits that the effect of this wages payment over that period is in the nature of a windfall to Mr Brown and, given that the effect of the Authority's substantive decision is to find that the original dismissal (the one on 8 May 2009) was justified, reimbursement of the total amount is sought.

[5] Conversely, Mr Brown tells me that the recovery of wages in these circumstances is discretionary and that, in any event, although Mr Brown was directed to be on garden leave, for reasons which I will refer to shortly, Mr Brown offered Avon the option of taking him back on the strength that he could provide value by working for the money that Avon was required to pay him. The purpose of the Authority's interim decision to reinstate Mr Brown on a garden leave basis was to give Avon the opportunity of inquiring into serious allegations of sexual harassment made against Mr Brown after his initial dismissal. By their very nature, it would have been imprudent for the Authority to direct that Mr Brown be returned to the workplace, but because the allegations against Mr Brown had, at the point of his first dismissal, not been put to him, it was only fair that Mr Brown had the opportunity of having those allegations formally put to him in order that he could respond to them and have the employer consider the allegations and his response in a proper way.

[6] It follows that I do not accept that Mr Brown's offer to Avon to return to duty was an offer which Avon could be reasonably expected to take up, given the particular circumstances of the case. Accordingly, I reject Mr Brown's contention that by reason of his offer to return to duty, Avon has not taken the proper steps to mitigate its loss.

[7] I do accept, however, that Mr Brown is correct to say that the recovery of wages in these circumstances is a discretionary remedy, but it is a discretion which, in this particular case, I propose to exercise in favour of Avon. I see no good reason why Avon should be put to the cost and expense of having paid Mr Brown over the period in question when, at the end of the Authority's investigation into the matters in contention, Avon's original decision to dismiss (and, for that matter, the subsequent decision to dismiss) were found to be decisions that a fair and reasonable employer would make in all the circumstances that applied at the relevant time.

The claim for costs

[8] Avon, as the successful party, seeks *a reasonable award of costs* in the sum of \$6,000. The Authority is told that total costs incurred by Avon amounted to \$19,000 or thereabouts inclusive of GST. However, that sum included all the attendances of counsel, including attendances relating to the disciplinary processes against Mr Brown and the intervening mediation.

[9] Conversely, Mr Brown says that an award of the magnitude sought by Avon would be out of step with the usual run of costs determinations in the Authority and seeks a costs award in the sum of \$2,500.

[10] The factual position is that there were two separate investigation meetings, the first involving the interim application for reinstatement after the first dismissal which, as Mr Brown's submission notes, was relatively brief. Indeed, the Authority's notes indicate that this matter was dealt with in approximately one hour's hearing time. Then there was the substantive investigation meeting which dealt with almost all of the evidence save for one of Avon's witnesses and the hearing of closing submissions from counsel. Aside entirely from the fact that three separate days were involved, the total running time would have not exceeded a day and a half of normal hearing time.

[11] On that basis, the daily tariff approach would suggest a contribution of perhaps \$4,500 for the elapsed time involved, and there is nothing in the particular circumstances of this case which would encourage me to depart from the principles espoused in that daily tariff approach. The matter was not unduly complex and although unusual in that it involved two separate dismissals and the consequences of those two dismissals for both parties, the arguments advanced by each party were not overly technical or unusual and neither party, in my opinion, unreasonably contributed

to the costs of the other. There is no reason in this case for costs not to follow the event, and accordingly I will make an award in favour of Avon for \$4,500.

[12] Mr Brown is directed to reimburse to Avon the total wages he received in the period from 8 May 2009 down to the date of the final determination, a gross amount of \$10,108.11. Counsel are to engage with each other to identify the practical arrangements for the reimbursing to Avon of that sum which, as it is a gross amount, presumably includes the amount paid by Avon as PAYE to the Inland Revenue Department on behalf of Mr Brown.

[13] Mr Brown is also to pay to Avon the sum of \$4,500 as a contribution to Avon's legal costs in this matter.

James Crichton
Member of the Employment Relations Authority