

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**[2014] NZERA Auckland 492
5372563**

BETWEEN ANNE CARNEY
Applicant

AND MAKANA NORTHLAND
LIMITED
Respondent

Member of Authority: Eleanor Robinson

Representatives: Mike Harrison, Advocate for Applicant
Matthew McGoldrick, Counsel for Respondent

Submissions received: 21 October 2014 from Applicant
10 November 2014 from Respondent

Determination: 2 December 2014

SUPPLEMENTARY DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] By determination dated 30 April 2013 ([2013] NZERA Auckland 151), the Authority found that the Applicant, Ms Anne Carney, was entitled to be paid a sum equivalent to 90 days wages in lieu of written notice being provided by the Respondent, Makana Northland Limited (Makana) in respect of the period 18 November 2011 to 16 February 2012.

[2] The Authority's substantive decision anticipated that the parties could resolve the amount that should be paid to Ms Carney between themselves. Unfortunately they have been unable to do so, and the matter of quantification of the 90 days' wages payment has devolved to the Authority for determination.

Submissions of the Applicant

[3] Mr Harrison submitted for Ms Carney that the amount due to be paid to her by Makana falls under s 123(1)(c)(ii) of the Employment Relations Act 2000 (the Act) as the determination was not made as compensation for lost wages, but as compensation for Makana not having provided her with written notice. Section 123 (1) (c) (ii) of the Act states:

123 Remedies

(1) *Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*

(c) *the payment to the employee of compensation by the employee's employer, including compensation for—*

(ii) *loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen:*

[4] Mr Harrison submits that the amount ordered to be paid by Makana is compensation in respect of Ms Carney having lost the benefit of being paid out or receiving written notice. Accordingly the benefit received by Ms Carney during the 90 day period in respect of payments by ACC should not be deducted from the award.

Respondents Submissions

[5] Mr McGoldrick, on behalf of Makana, submits that that the Authority's order that Makana pay to Ms Carney "*a sum equivalent to 90 days' wages in lieu of written notice*" is not the loss of a benefit, but a requirement to reimburse the employee an amount of wages lost by the employee pursuant to s 123(1)(b) of the Act which states:

123 Remedies

(1) *Where the Authority or the court determines that an employee has a personal grievance, it may, in settling the grievance, provide for any 1 or more of the following remedies:*

(b) *the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance:*

[6] Accordingly the payment to be made to Ms Carney must reflect the amount actually lost by her on the basis that the fundamental principle that an employee can recover no more than they have actually lost¹.

[7] On that basis it is submitted by Mr McGoldrick that any calculation of the amount owing to Ms Carney in respect of the 90 days' wages must take into account the amount of weekly compensation payments received from ACC during the relevant period, in addition to earnings received as a result of her employment with Orangewood Developments Limited during the period 23 January 2012 and 16 February 2012.

¹ *Sam's Fukuyama Food Services Ltd v Zhang I [2011] ERNZ 482*

Determination

[8] In determination [2013] NZERA Auckland 151 I set out at paragraph [118] that Ms Carney was to paid “*a sum equivalent to 90 days wages in lieu of written notice*” in accordance with clauses 12 (a) and (b) of the Employment Agreement which stated:

12. Termination

(a) *Notice: Employment may be terminated by either party giving ninety (90) days written notice. In the absence of appropriate notice being given, wages equivalent to the length of notice shall be paid or forfeited in lieu of notice. ...*

(b) *Illness or incapacity: In the event of Employee becoming unable to perform his or her obligations under this contract as a result of illness or capacity, Employer may terminate this contract by giving due notice as provided in paragraph 12 (a), provided that the illness or incapacity is of such severity as to render it impractical for Employer to continue to hold the position open.*

[9] Pursuant to clause 12 (a) of the Employment Agreement, Ms Carney was entitled, upon the termination of her employment with Makana and in the absence of contractual notice having been given by Makana, to wages equivalent to the length of that notice. In other words due to the absence of the contractual notice having been given by Makana, the payment is equal to the amount of wages to which Ms Carney would have been entitled but for the termination of her employment.

[10] As such I find that a payment of this nature is not: “*compensation for ... loss of any benefit*” pursuant to s 123(1)(c)(ii) of the Act, but is reimbursement of: “*the whole or any part of the wages*” to which Ms Carney would have been entitled had she remained in employment. It is remuneration which is taxable and payable under Ms Carney’s Employment Agreement.

[11] Accordingly I determine that the payment falls under s 123)(1)(b) of the Act which includes both wages and “*other money*” which has been lost “*as a result of the grievance*”.

[12] I find that Ms Carney is entitled to 90 days’ wages payment of \$14,875.00 gross (calculated on the basis of an annual salary payment of \$59,500.00 gross as supported by the payslips provided) for the period 18 November 2011 to 16 February 2012.

ACC Payments

[13] Mr McGoldrick submits that any calculation of the amount owing to Ms Carney in respect of the 90 days' wages must take into account the amount of weekly compensation payments received from ACC during the relevant period.

[14] In *Scissor Platforms (1997) Ltd v Brien*² the Employment Court held:³

The Tribunal was correct not to have deducted earnings related compensation insurance payments from compensation for lost remuneration. The liability for repayment of a benefit was a question to be determined between the individual beneficiary and the government department concerned. The same principles for non-deduction from remuneration compensation of unemployment benefits applied to earnings related accident compensation insurance payments.

[15] As also observed in that judgment:⁴ “Avoidance of double recovery is a matter to be dealt with between insurer and insured”. Accordingly I anticipate that Ms Carney will be advising ACC of this determination and pursuing this matter directly with ACC.

Payments earned during the period

[16] Mr McGoldrick submits that Ms Carney commenced employment with Orangewood Developments Limited on 23 January 2012 which is during the 90 day period covered by the payment in lieu, and that therefore her earnings received from Orangewood Developments Limited during that period should be deducted from the payment in lieu amount owed to her by Makana.

[17] As stated in the Employment Court case of *Atwill v Tanners Timberworld Ltd*⁵ the obligation to mitigate loss does not operate to reduce any sum payable under an employment agreement by way of payment in lieu of notice. In that case Colgan J, as he then was, stated:⁶

Three months was reasonable notice in the circumstances. The appellant was entitled to payment for the full three months' reasonable notice, despite his obtaining new employment after two weeks. The

² [1999] 2 ERNZ 672

³ Ibid at 673

⁴ Ibid at 682

⁵ *Atwill v Tanners Timberworld Ltd* [1994] 1 ERNZ 321

⁶ Ibid at 321

obligation to pay crystallised at the time of dismissal. The respondent's liability could not be determined after the event. There was no question of the appellant having been obliged to mitigate the loss of a fixed sum to which he was statutorily entitled.

[18] I determine that the amount owed by Makana to Ms Carney in respect of a sum equivalent to 90 days wages in lieu of written notice” is \$14,875.00 gross.

[19] In light of the considerable delay there has been in this matter, I order that Makana make payment of this amount within 7 days of the date of this determination.

Costs

[20] By determination [2013] NZERA Auckland 359 I ordered Ms Carney to pay Makana the sum of \$2,500.00 pursuant to clause 15 of Schedule 2 of the Act. That sum has not been paid and Makana is now seeking compliance.

[21] I am satisfied that Ms Carney has not complied with the terms of the Authority's determination of 12 August 2012. It is just in the circumstances for an order to be made requiring Ms Carney to comply with the determination.

[22] I therefore order Ms Carney to pay Makana, no later than 14 days from the date of this determination, the sum of \$2,500.00 pursuant to clause 15 of Schedule 2 of the Act.

**Eleanor Robinson
Member of the Employment Relations Authority**