



[2] By agreement with the parties the question of remedies had been reserved pending determination of the substantive issues. The parties having now completed their provision of supplementary information and submissions on remedies I proceed to a determination based on that material.

### **Issues**

[3] The supplementary material from the parties has addressed mitigation of loss, post dismissal earnings and the practicability of reinstatement. These issues are considered in assessing claims for reinstatement, reimbursement of lost earnings and compensation. Before addressing those specific heads however the first issue for consideration is the impact of contributory conduct on the level and type of remedies to be awarded.

#### **(i) Contributory conduct**

[4] In submissions Mr Yukich sought to minimise Mr Lewis's contribution to the situation that gave rise to his grievance. He said that lost earnings and compensation should not be "discounted" for contribution. However, for the reasons set out in the substantive decision I consider that Mr Lewis's contribution was high. In all the circumstances I set the level of contributory conduct at 40%.

#### **(ii) Reinstatement**

[5] Mr Swannink, City Care's area manager, gave evidence that there were no vacancies at all in the Bay of Plenty area indeed the only two vacancies in the whole company were both in the South Island. Mr Yukich did not dispute that this was the position but rather submitted that the Authority should make an order that Mr Lewis be reinstated to "*any future vacant position with City Care, based in the Bay of Plenty, of the same or similar nature...*"

[6] The respondent maintains that the Authority does not have jurisdiction to make a future order of this type. I agree.

[7] I have already indicated that it is not practicable for Mr Lewis and Mr Buckley to work together. Mr Lewis cannot return to his old position. I now accept also that there are no other positions within the respondent company that would be suitable for him. I conclude that reinstatement is not practicable

**(iii) Lost earnings**

[8] On Mr Lewis's behalf Mr Yukich claimed three months lost earnings. At an hourly rate of \$25.63 for a forty hour week this comes to \$13,327.60 in total. The undisputed details of his post dismissal job search and earnings are as follows. He received his final pay from City Care on 7 October 2009. Despite applying for a number of positions he was unemployed until 27 December 2009 when he started work as a self-employed contractor. His total earnings from the date of dismissal until the end of January were \$10,808.63.

[9] Total losses over the three months post dismissal are the difference: \$2,518.97. 40% is to be deducted from this figure in respect of contributory conduct. This leaves an award of \$1,511.38.

**(iv) Compensation**

[10] Mr Yukich claims \$30,000.00 compensation for hurt and humiliation. The respondent argues that this is excessive and not supported by the evidence. I agree. Awards at that level are reserved for the most egregious of cases, of which this is not one.

[11] However, I do accept that the dismissal was hugely disruptive and distressing for Mr Lewis and his wife, who gave evidence in his support. Mr Lewis had previously been a well-regarded worker. He was already under considerable stress in the workplace prior to the incident which led to his dismissal. He was also unwell at that time. Although he did contribute to the situation, it was not initially of his making, and he was not responsible for underlying problems within Mr Buckley's team.

[12] I am satisfied that in all the circumstances and but for contributory conduct, an award of \$10,000.00 would have been appropriate. After 40% deduction the award of compensation becomes \$6,000.00.

**(v) Summary of orders**

[13] **In summary, the respondent is ordered to pay to the applicant the following sums:**

- i. \$1,511.38 gross reimbursement of lost wages, and**
- ii. \$6,000.00 compensation for hurt and humiliation.**

[14] The applicant has already sought costs however this was premature. Any application for costs should be made within 28 days of the date of this determination.

Yvonne Oldfield

Member of the Employment Relations Authority