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Tree v Jansen Limited AA440/10 (Auckland) [2010] NZERA 792 (12 October 2010)

Last Updated: 18 November 2010

IN THE EMPLOYMENT RELATIONS AUTHORITY AUCKLAND

AA 440/10 5316307

BETWEEN STEVE TREE

Applicant

AND JANSEN LIMITED

Respondent

Member of Authority: Representatives:

Investigation Meeting: Determination:

Robin Arthur

Claire Mansell for Applicant Andrew Swan for Respondent

11. October 2010
12. October 2010

DETERMINATION OF THE AUTHORITY

[1] Steve Tree has applied for orders requiring Jansen Limited (JL) to pay amounts outstanding from sums awarded to him in Authority determinations AA169/10 (13 April 2010) and AA 169A/10 (26 July 2010). Mr Tree was awarded \$8000 as compensation for hurt and humiliation, \$333.82 for unpaid commission and

\$4000 costs.

[2] The Authority dismissed JL's counterclaim for damages. The company has elected to challenge that part of the determination but not the findings relating to its unjustified dismissal of Mr Tree. I am advised by counsel that the court's hearing of the challenge (ARC 42/10) is set down for 8 November 2010.

[3] In early June 2010, and pending the hearing of the challenge, the parties through counsel agreed that the \$8333.82 ordered under determination AA169/10 would be paid into the Employment Court. However it was not until 22 July 2010 that JL deposited the sum of \$8000 with the court. The remainder of the agreed amount - \$333.82 - was said to have been omitted by oversight.

[4] On 26 July the Authority issued determination AA 169A/10 awarding \$4000 costs.

[5] JL would not agree to pay the outstanding amount of \$4333.82 to Mr Tree directly or into the court pending the hearing of the part challenge.

[6] He sought a compliance order from the Authority and the application was set down for an investigation meeting. JL's statement in reply, in essence, suggested that the Authority should stay its orders pending the outcome of the part challenge. At the investigation meeting Ms Mansell advised the Authority that Mr Tree would consent to a stay if the outstanding funds were paid into the court meanwhile. Mr Swan advised that JL's position was that it would rather retain the funds but offer an undertaking to pay interest on them if it were unsuccessful in its challenge before the court.

Determination

[7] I have discussed the issues with counsel, and having heard submissions from them. Under [s180](#) of the [Employment Relations Act 2000](#) (the Act) I order a stay of the orders made in Authority determinations AA169 and AA169A. That stay is ordered on the condition that JL pay into the court, by no later than seven days from the date of this determination, the further sums of \$4333.82 (to be held on trust on the usual interest bearing arrangements pending the court's decision in matter ARC42/10). Failure to meet that condition would render JL liable to pay that amount to Mr Tree without further delay.

[8] The reason for the conditional stay is firstly one of public interest. As is clear from [s180](#) of the Act, an election to challenge some or all of a determination does not operate automatically as a stay. Determinations of the Authority are legally enforceable and the orders made, including awards of money, are to be followed in full unless the Authority or the court orders a stay. A party cannot arbitrarily and unilaterally decide how much, if any, of a determination it will abide by in the meantime. Prudent practice is to seek a stay at the time of filing a challenge unless the parties have agreed some suitable interim arrangement.

[9] The second reason is that payment into the court of the full amount ordered by the Authority (\$12,333.82 held in an interest bearing account) best protects the interests of both parties pending the court's decision on the part challenge. Whichever party is ultimately successfully is guaranteed access to the full amount of funds due along with the comfort of the interest for having lost the benefit of the use of the money in the meantime.

[10] The third reason is that JL had already agreed to pay in \$8333.82 but did not comply with the full extent of that agreement. There was some suggestion this was mere oversight but it was a matter which could have been put right.

[11] A fourth reason is that a stay in the present circumstances appears consistent with the legal principles usually applied in the case law. There is nothing to suggest that JL is not properly prosecuting its challenge. Mr Tree will not be injuriously affected provided his award in the Authority is meanwhile protected by being paid into the court, in full, and earning interest. JL might lose the benefit of a successful challenge - if it were awarded damages - which could then be offset against the awards to Mr Tree for his unjustified dismissal and short-paid commission. The stay preserves the status quo following the Authority's determinations.

Costs

[12] Mr Tree sought solicitor-client costs on this application on the basis that he should not have been put to the expense of having made it. He is entitled to costs on the event of his success in securing a predictable outcome. I fix those costs at \$750 allowing - at a notional reasonable hourly rate of \$250 for counsel's time - for two hours of preparation in drafting a statement of problem, considering the statement in reply and preparing for the investigation meeting and one hour for participation at the meeting. Actual costs (on a time-recorded basis) were calculated by counsel at just

over \$1400.

[13] JL is ordered to pay to Mr Tree the sum of \$750 in costs in relation to this application and \$70 in reimbursement of the fee for lodging it.

Robin Arthur
Member of the Employment Relations Authority