

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Geoffrey Watt (Applicant)
AND RD Managh Limited t/a Odin's Marine (Respondent)
REPRESENTATIVES David Bruce for Applicant
Danny Jacobsen for Respondent
MEMBER OF AUTHORITY Marija Urlich
INFORMATION AND SUBMISSIONS RECEIVED 8, 11 August and 6, 21 September, 5 October and 24 October 2006
DATE OF DETERMINATION 1 November 2006

DETERMINATION OF THE AUTHORITY

[1] In a determination dated 11 April 2006 (AA 123/06) the Authority upheld Mr Watt's claim that he had been unjustifiably dismissed and made awards in his favour including an order for reimbursement of lost wages to the sum of \$3,240.00 (gross). The respondent, RD Managh Limited t/as Odin's Marine, seeks to reopen that investigation in relation to the Authority's findings and award of lost wages. Mr Watt opposes this application.

[2] The Authority has a discretionary power to reopen an investigation on terms it thinks reasonable and stay any previous order in the meantime¹. A stay on the payment of the lost wages award has been made.

[3] With the consent of the parties this matter has been considered on the papers. Also with the consent of the parties the Authority has requested information from ACC and the Ministry of Social Development, agencies from whom Mr Watt respectively received accident compensation, unemployment benefits and accommodation supplements during the relevant period. This information has been provided to the parties who have subsequently filed affidavit evidence, further relevant information and submissions.

Do grounds for reopening exist?

[4] The relevant paragraphs of the determination which the respondent seeks to reopen are:

[22] Mr Watt claims for reimbursement of actual loss of wages from 7 March 2005 until 1 June 2005, when he obtained alternative employment, a total of 12 weeks at the rate of \$540 gross per week, being \$6,480.00. There is no evidence of Mr Watt making any attempt to mitigate his losses. Mr Managh alluded to Mr Watt getting paid to cut firewood and injuring himself while doing so and possibly being on accident compensation, but the evidence is inconclusive about this.

[23] But in any event, given that apart from the provisions of section 124 of the Act, having found that Mr Watt has a personal grievance, s.128(2) of the Act provides that the Authority is bound to order the employer to pay the sum equivalent to the actual lost remuneration, being \$6,480.00. However, as it is my conclusion that Mr Watt's contribution to the circumstances that gave rise to the personal grievance, that sum will be reduced accordingly.

¹ Schedule 2 clause 4 Employment Relations Act 2000

[5] As a consequence of the reopening application the Authority has received information which establishes that Mr Watt received income during the period for which he claims reimbursement of lost wages and received compensation for lost earnings during that period. I am satisfied that a miscarriage of justice would occur if the reopening application was not granted; relevant information as to Mr Watt's actual loss was not made available to the Authority during the original investigation.

[6] Mr Watt claimed reimbursement of actual lost wages totalling \$6480 (gross). Mr Watt earned \$432 (gross) in wages during the period for which he was awarded lost wages. Mr Watt did not tell the Authority that he earned \$432 (gross) during the investigation meeting. This information was within Mr Watt's knowledge and was relevant to the claim. No more than what was lost can be claimed. **\$432 (gross) is to be deducted from the total lost wages claimed.**

[7] Mr Watt received ACC entitlements from 19 April 2005 until 12 May 2005 totalling \$1036.80 (gross). These payments relate to the injury he sustained during his employment with AJ and LR Arnet. Again, this information was not put before the Authority, was within Mr Watt's knowledge and was clearly relevant to his claim for lost wages. I do not accept Mr Bruce's submission that an ACC entitlement should be treated as a WINZ benefit, that is recoverable from any award of damages. Mr Watt received the ACC entitlement because he was unable to work and was compensated accordingly. It follows that this period cannot form part of the claim period for reimbursement of lost wages because Mr Watt was not available to work and has already been compensated for that period of loss. **The period of 19 April 2005 to 12 May 2005 should be removed from the claim period and I so order.**

[8] The respondent seeks to have Mr Watt's claim for lost wages stopped at 4 April 2005 when Mr Watt commenced employment with AJ and LR Arnet or in the alternative 19 April 2005, from when Mr Watt's received ACC entitlements. Section 128(2) of the Act provides for mandatory reimbursement of a minimum of three months lost wages or the amount actually lost if it is less than this amount. Securing a position which pays less than the position from that which the applicant worker was dismissed is not a basis to reduce the three month minimum period but rather is grounds to reduce the amount for which actual loss can be established.

[9] It does not follow that the receipt of an ACC entitlement severs the period within which reimbursement may be claimed. Rather an ACC entitlement received within the three month period creates a hiatus in that period. The applicant worker has received the entitlement because they are not fit for work and have been compensated for those losses at a level set by statute. However, once the worker no longer receives the ACC entitlement then the reimbursement period recommences as they are fit for work.

[10] I decline to reopen the investigation on the grounds that Mr Watt's failure to mitigate his loss denies him any award of lost earnings. I am satisfied that in its original investigation the Authority considered the issue of mitigation and has made an award of lost wages having exercised its discretion to do so. Whether that discretion was exercised within accepted principles is not a matter for a reopening application but one more properly brought by way of challenge.

Costs

[11] I have received submissions from Mr Watt in relation to the issue of costs in his personal grievance and this reopening investigation. I have received costs submissions from the respondent only in regard to the reopening investigation.

[13] I would like to deal with these issues together and invite the respondent to file costs submissions in relation to the personal grievance. I will then move to determine costs for the substantive and reopening applications together.

Marija Urlich
Member of Employment Relations Authority