

Claims for lost salary—how much?

When awards for unjustified dismissal take loss of salary into account, employers may end up paying a substantial amount, **Paul Robertson** warns.



RECENT ARTICLES HAVE

focused on increases in awards made for hurt, humiliation and distress to employees who are successful with a personal grievance. There is less focus on awards of salary, but significant amounts can be recovered as confirmed in the following decision.

LATEST DECISION

Roach v Nazareth Care Charitable Trust Board involved a failed attempt by the employer to rely on a 90-day trial period in relation to its employment of a new general manager. Because the trial period was not effective, Mr Roach's termination was held to be unjustified, and he claimed reimbursement for lost wages, and for hurt, humiliation and distress.

Mr Roach unsuccessfully applied for 97 positions before finding part-time work. It appears his age and the seniority of his previous positions counted against him. Down to the date of the hearing, 18 months after he had been dismissed, Mr Roach had earned \$163,000 less than he would

have earned had he remained employed.

The Authority considered what would have happened had he not been dismissed; would he have remained employed long term anyway? Counsel for the employer referred to the short term of the employment, alleged performance issues and similar factors.

The Authority was reluctant to reduce the amount to be awarded because the employer had not provided evidence to support its submission that Mr Roach would not have remained employed long term. Mr Roach was awarded the equivalent of 12 month's lost salary less his (reduced) earnings over that period, a net figure of \$115,000, and \$25,000 for hurt, humiliation and distress, costs and interest.

OTHER CASES

In other decisions, the compensation for lost salary has been significantly reduced because the employee would have been dismissed in any event. For instance, in *Hall v Dionex Pty Limited* [2015]

NZEmpC 29 the employee, a senior manager, had a "clear lack of insight" into aspects of his conduct, such as viewing pornography on his office computer. The manager was in his sixties, and he attended many job interviews over the three years between his dismissal and the hearing.

He brought four Eastlight folder's worth of documents to the hearing documenting his efforts to find work. He succeeded with his personal grievance, but was only awarded six months lost salary because the Authority accepted that his behaviour at work was likely to lead to his dismissal at some point, and also because restructuring was likely to have put his job at risk.

In *Clear v Waikato District Health Board* [2011] NZEmpC 48, a midwife complained to her employer that she was bullied by her manager. The employer did not take that complaint seriously, breaching its duty to provide her with safe working conditions. The midwife, then aged 64, became unwell and eventually was dismissed because of absences

from work. Lost salary over five years was claimed totalling \$250,000.

Just over \$40,000 was awarded because of evidence that her ill health, and her inability to work, had in part been caused by pre-existing medical conditions, and because even if the board had been more proactive in investigating the allegations, the bad relationship between the midwife and her manager would have eventually meant that she was forced to resign.

WATCH OUT!

A common theme in these cases is that an employee, either senior in years or unwell, raises a personal grievance after being dismissed, then finds it difficult to find a new position. On that scenario, the employer is at serious risk of being ordered to pay a substantial amount of lost salary.



Roach v Nazareth Care Charitable Trust Board [2018] NZEmpC 123

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