

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 296
3131362

BETWEEN SHIRLEY BRUNNING
Applicant

AND RICCARTON FLORIST LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Paul Mathews, advocate for the Applicant
Kelly Rushton, advocate for the Respondent

Submissions Received: 22 April 2021 from the Applicant
3 May 2021 from the Respondent

Date of Determination: 12 July 2021

DETERMINATION OF THE AUTHORITY

- A. Riccarton Florist Limited is to comply with paragraph [44] (a) and (b) of the determination of the Authority [2020] NZERA 532 by paying Shirley Brunning the sums of \$13,000.00 and \$1,482.00, by no later than Friday 13 August 2021.**
- B. Riccarton Florist Limited is to comply with paragraph [24] of the determination of the Authority [2021] NZERA 13 by paying Shirley Brunning the sums of \$5,500.00 and \$224.89, by no later than Friday 13 August 2021.**
- C. Riccarton Florist Limited is to pay Shirley Brunning costs of \$571.56, by no later than Friday 13 August 2021.**

Employment relationship problem

[1] Riccarton Florist Limited was ordered to pay Shirley Brunning compensation of \$13,000.00, reimbursement of \$1,482.00 and costs of \$5,724.89.¹ No payment has been made and there has been no arrangement to do so.

[2] Ms Brunning now seeks a compliance order, interest and costs. A claim for a penalty was later abandoned. Riccarton Florist opposes these orders but also seeks a stay, pending the outcome of a challenge by Ms Brunning to the Authority's 2020 determination.

[3] It was agreed that the present application would be investigated based on the material and submissions provided by the parties.

Should the Authority's earlier determinations be stayed?

[4] Ms Brunning has elected to challenge parts of the Authority's 2020 determination² on a non-de novo basis. Riccarton Florist has not challenged either determination. I have not been provided with the statement of claim or statement of defence on the challenge.

[5] Mr Mathews says that if the challenge is successful, Riccarton Florist would be ordered to pay more than was awarded in compensation and reimbursement. If Ms Brunning is not successful, the existing awards would be unaffected. Mr Rushton says that if the orders were not stayed, and if the company successfully defends the challenge, it would likely not be able to recover any payments it had made to Ms Brunning. I was not referred to any decided case to establish whether a non-de novo challenge by an employee seeking a larger compensation award gives the Court power to reduce the Authority's award. For current purposes, I make the assumption that this is a possibility.

[6] There is no evidence to support Riccarton Florist's assertion that any payments it made to Ms Brunning would come under the control of a state agency, meaning that an overpayment to Ms Brunning might not be recoverable from her later by Riccarton Florist.

¹ *Brunning v Riccarton Florist Limited* [2020] NZERA 532 and *Brunning v Riccarton Florist Limited* [2021] NZERA 13.

² *Brunning v Riccarton Florist Limited* [2020] NZERA 532.

However, for current purposes I will make the assumption that there is a risk that payments made now to Ms Brunning might not be recoverable.

[7] Mr Rushton refers me to Regulation 64(1) of the Employment Court Regulations 2000. If a party elects to challenge a determination, the Authority and the Court each have power to order a stay of proceedings under the determination to which the election relates. I note also that s 180 of the Employment Relations Act 2000 (the Act) provides that an election does not operate as a stay unless the Court or the Authority so orders. The Authority has power to order a stay, at least with respect to the 2020 determination, but the power must be exercised judicially and in accordance with principle.³

[8] Riccarton Florist's rights on the challenge are not affected in the absence of a stay. Ms Brunning's challenge appears to have been brought and is being prosecuted in good faith. A stay would affect Ms Brunning's right to the benefit of the Authority's determinations in her favour. Novel or important questions do not appear to be involved in the case and there does not appear to be any general public interest in its outcome. On the earlier assumptions, the balance of convenience favours Riccarton Florist slightly. Ms Brunning is deprived of her compensation in the meantime, while there might be a risk of Riccarton Florist not being able to recover money paid now, if the challenge affects that.

[9] I am also told by Mr Rushton that Riccarton Florist is not in a position to make any payment to Ms Brunning. Details and supporting information has not been provided. I am not persuaded that any weight should be given to the assertion.

[10] Often, a stay might be granted on conditions such as payment into a trust account pending further order, so that the parties' interests are protected in the meantime to a reasonable extent. There is no material before me to indicate that Riccarton Florist has offered any arrangement. Riccarton Florist seeks to maintain the position it was in before the determinations, while not doing anything to meet legal obligations under the determinations.

[11] Overall, I am not persuaded that there should be a stay of the orders in the determination⁴ that is subject to the challenge. I do not have power to order a stay in respect

³ *Shalini Ltd v Labour Inspector* [2019] NZEmpC 170

⁴ *Brunning v Riccarton Florist Limited* [2020] NZERA 532.

of the determination⁵ that is not subject to a challenge. Even if I had that power, I would have reached the same conclusion. I decline to order a stay.

Should there be a compliance order?

[12] Where a person has not complied with the Authority's determination, s 137 of the Act permits the Authority, by order to require that person to do any specified thing for the purpose of preventing further non-compliance with the determination.

[13] Riccarton Florist accepts it has not paid the amounts it was ordered to pay in the two determinations. However, there is an argument for Riccarton Florist that it has not breached the Authority's determinations, as no payment date was given in those determinations. I disagree. Absent a specific date by which sums must be paid, Ms Brunning was entitled to be paid and to take steps to enforce payment immediately on the date of the determination.⁶ Applying to the Authority for the exercise of its discretion to order compliance is an enforcement option. I find that by not paying the amounts ordered, Riccarton Florist has not complied with the two determinations of the Authority.

[14] There are criticisms about the approach taken by and the adequacy of the communication from Ms Brunning's representative after the determinations. Months have gone by since the determinations were issued. Riccarton Florist could have taken steps to meet the payments it was ordered to make, but has not. The criticisms are immaterial at this point, so need not be set out.

[15] If a compliance order relates to the payment to an employee of a sum of money, the Authority may order payment by instalments, but only if the financial position of the employer requires it. While Mr Rushton says that Riccarton Florist is not in a position to make any payment, no detail or supporting evidence was provided. Riccarton Florist has not proven its financial position requires an order that it make payment by instalments.

⁵ *Brunning v Riccarton Florist Limited* [2021] NZERA 13.

⁶ Some enforcement steps might first require a certificate of determination: see Regulation 26(3) of the Employment Relations Authority Regulations 2000, but also s 141 of the Employment Relations Act 2000.

[16] I am persuaded that I should order Riccarton Florist to comply with the earlier determinations by pay Ms Brunning \$13,000.00 and \$1,482.00 as ordered on 22 December 2020 and a further \$5,724.89 as ordered on 15 January 2021.

[17] I will allow Riccarton Florist an opportunity to arrange its affairs to comply. Riccarton Florist must comply with the orders in the determinations by Friday 13 August 2021.

Other orders

[18] I am asked to order the payment of interest on the “default payments”. There is power under clause 11 of the Second Schedule to the Act in any matter involving the recovery of any money to order the inclusion, in the sum for which judgment is given, of interest, calculated in accordance with Schedule 2 of the Interest on Money Claims Act 2016. The Authority has ordered interest to be paid when making a compliance order against a person who defaulted on payments due under a record of settlement entered into under s 149 of the Act.⁷ There is no reason to read the power narrowly to exclude its application in respect of sums for which judgment has already been given in a determination.⁸

[19] However, if the sums payable to Ms Brunning are adjusted as a result of the challenge, there would also have to be a consequential effect on the amount of interest payable. The better approach at this stage is not to include interest.

[20] There is a claim for costs on the present application. \$1,125.00 plus \$71.56 for the lodgement fee is sought. I am told that the actual costs in respect of the “recovery of the awarded monies” and the application are \$950.00 plus GST.

[21] Mr Rushton notes that costs of \$550.00 plus \$71.56 were sought in the statement of problem. He also notes that the Authority’s practice is to make awards of costs on a “GST inclusive” basis. His submission is that there should be no award of costs. Alternatively, I am referred to *Ceres New Zealand LLC v Allison*⁹ as an example of reasonable costs in a similar case.

⁷ *Sinclair v Datum Connect Limited* [2014] NZERA Auckland 463.

⁸ *Labour Inspector v Hurunui Hotel (2004) Limited* [2014] NZERA Christchurch 214.

⁹ *Ceres New Zealand LLC v Allison* [2021] NZERA 152.

[22] Ms Brunning would ordinarily be entitled to a contribution to her reasonable costs, having been successful. There is no reason to depart from that principle here. I am not able to apply the standard daily tariff approach as the matter was investigated on the papers. An award at the level sought in submissions for Ms Brunning would likely exceed the legal costs attributable to the compliance application, given the description accompanying the submission indicates costs of \$950 plus GST included some work prior to the application. I agree that costs at the same level as in *Ceres New Zealand LLC* would be appropriate as a reasonable contribution. There will be an order for costs of \$500.00 plus a further \$71.56 to cover the lodgement fee.

Philip Cheyne
Member of the Employment Relations Authority