

[2] After pursuing payment for some time, Mr Ellison sought leave to apply out of time for costs. Leave was granted and he was awarded \$9,071.56 in costs and disbursements from the Cowans (the costs determination).²

[3] Mr Ellison then sought a compliance order requiring the Cowans to pay the sums still outstanding under both determinations.

The Authority's investigation

[4] On 20 October 2023 a case management conference was held by telephone with the representatives of the parties. By that point the Cowans had paid \$15,000 of the amount due under the 2021 determination and nothing towards the costs awarded.

[5] Ms Cowan indicated that they were able to pay another sum of money to Mr Ellison on 31 October 2023. With the parties' agreement, the Authority decided to await that payment and then, if there was still money outstanding, deal with the matter on the papers.

[6] On 3 November 2023 Mr Ellison's representative advised that payment had been made covering the remainder of the award in the 2021 determination. Outstanding was the full amount under the costs determination. The Cowans were given an opportunity to make any further comment but nothing was received.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has not recorded everything received from the parties but has stated findings and conclusions and specified orders made as a result.

Issues

[8] The issues for determination are:

- (a) Should a compliance order be issued against Mr Cowan and Ms Cowan regarding the determinations of the Authority?
- (b) Should Mr Cowan and Ms Cowan pay interest to Mr Ellison on sums not paid in time?
- (c) Should either party have to contribute to the other party's costs?

² *Jarrod Ellison v Robert Cowan and Kelly Cowan* [2023] NZERA 288 (file 3061272).

Compliance order should be made

[9] The Authority is able to make a compliance order under s 137(1)(b) of the Act where a person has not observed or complied with any determination of the Authority. The power is discretionary.

[10] Here the 2021 determination has now been observed by payment of all the money owing under it. No compliance order is therefore needed. Not so the costs determination, where the entire sum of \$9,071.56 remains outstanding.

[11] There is a prospect of the Cowans coming into some money which could cover that sum. Although they express concerns about their ability to pay immediately, it is still appropriate to require them to make payment. They did not express opposition to the making of a compliance order. I conclude that an order should be made.

[12] The Cowans should be aware that if they fail to comply with the compliance order Mr Ellison is able to pursue the breach in the Employment Court or the District Court. The Employment Court's powers include imposing a fine not exceeding \$40,000.

Interest payable

[13] The Authority has the power to order interest under clause 11 of Schedule 2 of the Act. Mr Ellison seeks interest calculated under the civil debt calculator on the Ministry of Justice website of:

- (a) \$256.54 - on \$3,609.77 outstanding under the 2021 determination between 28 March 2021 and 31 October 2023; and
- (b) \$167.55 – on \$9,071.56 outstanding under the costs determination between 29 June 2023 and 1 November 2023.³

[14] Mr Ellison has been deprived of money he was entitled to and should be paid interest in the amount of the combined total of \$424.09.⁴

³ <https://www.justice.govt.nz/fines/civil-debt-interest-calculator/>

Costs payable

[15] Mr Ellison seeks additional costs be awarded because he has had to take additional steps to recover the amounts owing.

[16] Reliance is placed on *McKay v Wanaka Pharmacy Limited*, concerning costs sought for a compliance order application.⁵ For Mr Ellison it is argued that he has experienced unnecessary delays in receiving the amounts that were due to him, with the Cowans accepting they did not have any acceptable defence to the non-payment. An alleged inability to pay is noted as not being defence. A starting point of \$1,125 was sought with an uplift of \$750 in recognition of the fact Mr Ellison is said to have had to lodge an unnecessary application.

[17] The Authority's discretionary power regarding costs is set out in cl 15 of Schedule 2 of the Act. Considering the matter in a principled way, balancing the need for Mr Ellison to seek a compliance order when the obligations were clear and the limited work required for this application which was dealt with on the papers, I conclude that the Cowans should pay Mr Ellison \$1,000 as a contribution to his costs.

[18] Mr Ellison should also be reimbursed for the Authority's filing fee.

Orders

[19] The Authority orders that within 28 days of the date of this determination Robert Cowan and Kelly Cowan are jointly and severally to:

- (a) Comply with the Authority's determination [2023] NZERA 288 by paying Jarrod Ellison \$9,071.56 outstanding under that determination; and
- (b) Pay Jarrod Ellison the following sums:
 - (i) Interest of \$424.09;
 - (ii) Costs on this application of \$1,000; and
 - (iii) The Authority's filing fee of \$71.56 on this application.

Nicola Craig
Member of the Employment Relations Authority

⁵ *McKay v Wanaka Pharmacy Limited* [2020] NZERA 540.