

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 509
5518162

BETWEEN KATE FEENEY, LABOUR
INSPECTOR
Applicant

AND BY LIMITED
Respondent

Member of Authority: Robin Arthur
Representatives: Annabelle Skadiang, counsel for the Applicant
No attendance for the Respondent
Investigation Meeting: 9 December 2014
Determination: 9 December 2014

DETERMINATION OF THE AUTHORITY

- A. Under s137 and 138 of the Employment Relations Act BY Limited must, within 14 days of the date of this determination, comply with orders made in an earlier Authority determination on this matter (as issued on 29 May 2014).**
- B. BYL must also pay the Inspector a further \$71.56 in reimbursement of the fee paid to lodge the application for a compliance order.**

Employment relationship problem

[1] The Labour Inspector sought a compliance order against BY Limited under s137 of the Employment Relations Act 2000 (the Act). She said BYL had failed to comply with orders made in an earlier determination of the Authority requiring the

company to pay a total of \$14,263.12 in wage arrears, penalties and reimbursement of fees.¹

[2] The amounts that the Authority had ordered BYL to pay within 28 days of the determination issued on 29 May 2014 comprised:

- (i) \$3000 as a penalty for failing to comply with all the terms of an Improvement Notice issued by the Inspector to BYL on 27 November 2013; and
- (ii) \$6120 as wages arrears to a former employee of BYL; and
- (iii) \$5000 as a penalty for breaching the Wages Protection Act 1983 (with \$2000 of that amount to be paid to the former employee); and
- (iv) \$143.12 in reimbursement of fees paid by the Inspector to lodge two matters in the Authority.

[3] It was not possible to serve the Inspector's application and the Notice of Investigation Meeting to BYL's registered office and address for service. That address was the same as that of the café BYL had operated in Fort Street. Affirmed evidence from the Inspector confirmed that, from at least September 2014, the café was closed. The Inspector said she had spoken to the landlord of the premises who told her BYL was released from the lease.

[4] At the Authority's direction, however, the Inspector made extensive efforts to locate BYL's director Bin Zhang and serve him with a copy of her application for a compliance order. She checked previous known residential addresses for him and then found a new address in Epsom at which Mr Zhang was believed to live. At that address a woman, who identified herself as Mr Zhang's partner and who said he lived there, accepted service of the Inspector's application and related documents. The Authority subsequently issued a Notice of Investigation Meeting which was served at that address and, according to courier records, signed for by Bin Zhang. The Notice was also sent to an email address known to have been used previously by Mr Zhang for BYL business.

[5] On the basis of that information I was satisfied reasonable endeavours were made to notify BYL of the Inspector's application and to provide the company with

¹ [2014] NZERA Auckland 208 (29 May 2014).

adequate opportunity to attend the Investigation Meeting and be heard on it. No-one attended the investigation meeting on BYL's behalf and, after waiting ten minutes beyond the appointed time, I proceeded with the investigation meeting. Under clause 12 of Schedule 2 of the Act the Authority may proceed where, without good cause shown, a party fails to attend.

Grounds for a compliance order

[6] The Inspector's evidence confirmed BYL had not paid the amounts of wage arrears, penalties and reimbursement of fees ordered earlier. In those circumstances an order for compliance was appropriate.

[7] Before making the order I considered whether such an order was likely to have any practical benefit or effect. Some Employment Law commentary notes case law suggesting the Authority should not make orders that were likely to be futile.²

[8] On the basis of Ms Skadiang's brief oral submissions and the Inspector's evidence, I have accepted there was some practical benefit to a compliance order in the present case for the following reasons:

- (i) An order preserves the Inspector's position to pursue further means to recover the money owed, including by applying to the Employment Court for further orders (which may include fines and sequestration of property).³
- (ii) BYL remained a registered company and was not in liquidation so could return to trading.
- (iii) While there may realistically be some doubt that BYL was likely to have funds to meet the order, there was no conclusive information that it did not have access to any funds to do so.
- (iv) A determination granting a compliance order may also be relevant to other agencies in any dealings with BYL, both in respect of past and unmet obligations and in respect of future dealings, such as if BYL sought to sponsor any further employees through the immigration process.

² *Mazengarb's Employment Law* ERA 137.61, *Brookers Employment Law* ER137.14(2)(b) and *New Zealand Clerical Workers Union v Huysers Books Ltd* (unreported, EC, WEC28/91, 17 December 1991).

³ Section 138(6) and 140(6) of the Act.

[9] Accordingly I have made the compliance order set out at the head of this determination, along with an order for BYL to reimburse the Inspector for the fee to lodge her application in the Authority.

Robin Arthur
Member of the Employment Relations Authority