

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 204
5417845

BETWEEN NICHOLAS HOGEBOOM
 Applicant

A N D QUALITY FIREWOOD LIMITED
 Respondent

Member of Authority: David Appleton

Representatives: Phillip de Wattignar, Advocate for Applicant
 Camerone McDougall, for Respondent

Investigation Meeting: Determined on the papers by consent

Submissions Received: from Applicant
 from Respondent

Date of Determination: 5 December 2014

DETERMINATION OF THE AUTHORITY

- A. The respondent is ordered to pay the entire sum currently owed to the applicant in a single lump sum by no later than 4pm on Wednesday 24 December 2014.**
- B. The respondent is to pay to the applicant the Authority lodgement fee of \$71.56 within five working days of the date of this determination. Any other costs sought by the applicant are reserved.**

Employment relationship problem

[1] Mr Hogeboom seeks compliance orders directing the respondent to make payment to him of amounts ordered in three determinations issued by the Authority.

[2] The respondent does not deny that the company owes sums of money pursuant to the Authority's previous determinations, but states that it has made regular payments of \$40 per week to discharge the sums due and that the financial position of the company precludes it from paying significantly more than that sum. Mr Hogeboom wishes payment to be made in larger instalments than \$40 per week.

The Authority's previous orders

[3] Pursuant to the Authority's determination [2014] NZERA Christchurch 13, the respondent was to pay to Mr Hogeboom the sum of \$204. It is accepted by Mr de Wattignar that this sum has now been paid.

[4] Pursuant to the Authority's determination [2014] NZERA Christchurch 28, the respondent was ordered to pay to Mr Hogeboom the sum of \$4,500.

[5] Finally, pursuant to the Authority's determination [2014] NZERA Christchurch 41, the respondent was ordered to pay to Mr Hogeboom the sum of \$402.91 net in respect of unpaid wages and a further sum of \$1,500 in respect of costs.

[6] Between 22 April and 11 November 2014, Mr Hogeboom has received from the respondent the total sum of \$1,240 in partial discharge of the sums ordered by the Authority.

The issue

[7] The issue before the Authority, therefore, is not whether a compliance order should be made, as it clearly should, the respondent being in default of the Authority's previous orders, but to consider a realistic payment scheme which will enable the respondent to discharge its obligations towards the applicant in a way that is financially viable for the respondent company.

[8] Section 137(1)(b) of the Employment Relations Act 2000 (the Act) provides as follows:

This section applies where any person has not observed or complied with –

...

(b) any order, determination, direction, or requirement made or given under this Act by the Authority or a member or officer of the Authority.

[9] Section 137(2) to (4) provides as follows:

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- (2) *Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.*
- (3) *The Authority must specify a time within which the order is to be obeyed.*
- (4) *The following persons may take action against another person by applying to the Authority for an order of the kind described in subsection (2):*
- (a) any person (being an employee, employer, union, or employer organisation) who alleges that that person has been affected by non-observance or non-compliance of the kind described in subsection (1):*
 - (b) a health and safety inspector appointed under section 29 of the Health and Safety in Employment Act 1992 who alleges that there has been non-observance or non-compliance of the kind described in subsection (1)(a)(xi).*

[10] Section 138(4) to (6) provides as follows:

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- (4) *A compliance order of the kind described in section 137(2)—*
- (a) may be made subject to such terms and conditions as the Authority thinks fit (including conditions as to the actions of the applicant); and*
 - (b) may be expressed to continue in force until a specified time or the happening of a specified event.*
- (4A) *If the compliance order relates in whole or in part to the payment to an employee of a sum of money, the Authority may order payment to the employee by instalments, but only if the financial position of the employer requires it.*
- (5) *Where the Authority makes a compliance order of the kind described in section 137(2), it may then adjourn the matter, without imposing any penalty or making a final determination, to enable the compliance order to be complied with while the matter is adjourned.*
- (6) *Where any person fails to comply with a compliance order made under section 137, the person affected by the failure may apply to the court for the exercise of its powers under section 140(6).*

[11] In order to help it establish, pursuant to s.138(4A) whether the financial position of the respondent requires the Authority to order payment of the sums due to Mr Hogeboom by instalments, the Authority directed the respondent to provide financial information to enable it to assess that question.

[12] The respondent provided copies of its financial statements for the financial year ending 31 March 2014 and for the months of April to September 2014. These statements showed that the net surplus of the company fluctuated significantly from

month to month. While such fluctuations might be expected due to the seasonal nature of the respondent's business, some of these fluctuations occurred within the seasons.

[13] The respondent then emailed the Authority to say that the figures it had provided did not read accurately, correcting the net surplus figure for the 12 month period to September 2014.

[14] The Authority requested further information from the respondent; namely a statement of assets and liabilities. However, on 5 December Mr McDougall, Managing Director of the respondent, replied declining to provide the information the Authority sought. This was a surprising response given that the respondent was being given another opportunity to present information to the Authority which could have persuaded it to order compliance by way of instalments.

[15] However, on the basis of the information that was provided, I am not satisfied that the financial position of the employer requires payment of the remaining sum due to Mr Hogeboom by instalments, as is provided by s138(4A) of the Act. In addition, the remaining sum due is relatively modest and Mr Hogeboom has waited a significant amount of time for payment of the sums ordered to be received.

[16] I therefore decline to order payment of the balance of the sums due to Mr Hogeboom by instalments.

[17] On the assumption that the respondent has been continuing to pay Mr Hogeboom \$40 a week, I calculate the remaining sum due, at the date of this determination, to be \$5,246.91. If this calculation is incorrect, Mr de Wattignar is to liaise with the respondent of the correct sum due as a matter of urgency, so that they have agreed the correct sum by no later than 4pm on Friday 12 December 2014.

Orders

[18] Pursuant to s.137(2) of the Act, I order that the respondent is to pay to the applicant the sum of \$5,246.91 (or such other sum as may be remaining due to Mr Hogeboom at the date of this determination pursuant to the three previous determinations of the Authority noted in paragraphs [3] to [5] above), by way of a single lump sum. Such sum is to be paid to Mr Hogeboom by no later than 4pm on Wednesday 24 December 2014.

Costs

[19] Mr de Wattignar did not indicate in the statement of problem what costs have been incurred by Mr Hogeboom in making his application for a compliance order, but it is plain that the lodgement fee of \$71.56 will have been incurred, which I **order** the respondent to pay Mr Hogeboom as a separate payment **within five working days** of the date of this determination.

[20] If Mr Hogeboom seeks a contribution of costs over and above the lodgement fee, then Mr de Wattignar is to serve and lodge a memorandum seeking costs no later than 14 calendar days from the date of this determination. The respondent shall then have a further 14 working days within which to reply (taking into account the intervening Christmas and New Year holiday season).

David Appleton
Member of the Employment Relations Authority