

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2023] NZERA 189
3207459

BETWEEN ANTHONY PORIMA
 Applicant

AND LOGGERTECHNZ LIMITED
 Respondent

Member of Authority: Michael Loftus

Representatives: Ira White, advocate for the Applicant
 Cliff Fellingham, for the Respondent

Investigation Meeting: On the papers

Further information
Received: 2 March 2023 from the Respondent
 12 March and 31 March 2023 from the Applicant

Date of Determination: 18 April 2023

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicant, Anthony Porima, seeks an order requiring the respondent, Loggertech NZ Limited (Loggertech), to comply with an order previously made by the Authority. He also seeks \$821.56 being the cost (including the Authority's filing fee) of making this application plus interest and a penalty.

[2] Loggertech accepts compliance has been incomplete but argues it requires additional time to make good the Authority's orders.

Background

[3] On 28 September 2022 I issued a determination in which I ordered Loggertech pay \$3,513.92 being monies improperly deducted from Mr Porima's pay.¹

[4] Payment was not forthcoming and on 14 November 2022 Ms White queried this on Mr Porima's behalf via Loggertech's then counsel. In the absence of a response the query was repeated on 23 November and a response came the following day. It was that Loggertech was struggling and the full amount could not be paid. Loggertech proposed weekly payments of \$100.

[5] The Statement of Problem advises Loggertech's proposal was rejected hence the compliance application which then followed.

[6] The resulting Statement in Reply states Loggertech was unaware of its offer's rejection before confirming payment had not, at that point been made (22 January 2023). The statement goes on to reiterate Loggetech was facing various difficulties with its accountant asserting significant arrears to both trade creditors and the Inland Revenue. The statement advises that while some relief was then in sight that had been delayed by ex-cyclone Hale which had struck about a week earlier. There was also advice that in the interim Loggertech had paid Mr Porima \$500 which Ms White accepts was correct.

[7] In the following exchanges Loggertech repeated its previous assertion it cannot make good the order with the previous situation have being exacerbated with the passing of cyclone Gabrielle on February 13 and 14. As well as the issues already outlined, its accountant listed the fixed outgoings generated by operating commitments, particularly plant essential to maintaining the business and the effect cyclone Gabrielle has had on using that equipment which is now isolated and unable to operate. In other words a difficult situation has been made even worse and it is asserted Loggertech will be unable to pay Mr Porima in the near term. No indication was given as to when payment might be made though there were indications of various approaches Loggertech was considering to address its issues.

[8] Mr Porima's response is the information is incomplete without full accounts and in any event the Authority's order should take precedent and be included in the company's fixed

¹ *Porima v Loggertech NZ Limited* [2022] NZERA 489

commitments. Comment is also made about the availability of business support to those affected by cyclone Gabrielle before closing with confirmation Mr Porima still seeks compliance, interest and costs. Comment is made that while Loggertech proposed instalments it then failed to continue their payment though that is, in my view, undermined by the fact that proposal was rejected.

[9] Finally I note a statement Mr Porima is seeking "...instalment or full payment as determined by the Authority." In other words there is implied acceptance the situation is such that instalment payments might be ordered.

Discussion

[10] That Loggertech has failed to pay the ordered amount is uncontested.

[11] That the Authority may order payment is also uncontested as is the fact it may, if the circumstances warrant, be by instalment.²

[12] Here, and notwithstanding Mr Porima's challenge regarding the sufficiency of the evidence supporting the claim full payment is inadequate, I conclude I am satisfied the evidence supports a conclusion Loggertech's situation is fraught and it cannot pay immediately. I do so for two reasons. First, evidence produced during the substantive investigation would support such a conclusion. Second, and more importantly, Chartered Accountants are regulated and subject to censure should they fail to comply with various obligations which include a requirement to act honestly and ethically.³ I have no cause to consider Loggertech's accountant's statements portray anything other than an accurate illustration of its affairs. They are not good.

[13] That said Mr Porima is correct when he says the debt exists and I should dismiss Loggertech's implied argument it can be discharged at the company's leisure. If for no other reason a compliance order requires a date by which compliance occur.⁴

[14] The fact is Loggertech is, and credit to it, trying to address its outgoings and standing obligations. Having reviewed those I accept Mr Porima's argument his debt should be added but scheduled accordingly.

² Section 138(4A) of the Employment Relations Act 2000

³ Section 5A of the New Zealand Institute of Chartered Accountants Act 1996

⁴Section 137(3) of the Employment Relations Act 2000

[15] To that end I will order Loggertech address its debt to Mr Porima by adding those monies to its scheduled monthly outgoings and order the payment of \$1,000 (or thereabouts) a month till payment is complete.

[16] Turning now to the claim for penalties. Penalties are for the flagrant disregard of things for which they can be imposed. Here, and for three reasons, I consider their imposition inappropriate.

[17] The first is that if there is one disconcerting aspect to this matter it is the inability of the parties to discuss their differences. In this respect I have to note all the signs pointed to an issue with respect to ability to pay yet notwithstanding Loggertech's offer which showed a willingness to enter into discussion there is no evidence Mr Porima responded in kind. The duty to communicate operates two ways.

[18] The second is that Loggerrtech has made some efforts to address the issue which means a penalty, should one be ordered, will be modest at best.

[19] The third is that while Mr Porima is due recompense, Loggertech's situation is fraught. It is better those funds that are available be directed toward satisfying Loggertech;s debt to Mr Porima than being diverted to the Crown in order to pay a penalty, especially when that penalty might push it over the edge and ensure nothing is forthcoming.

[20] Similarly I am not persuaded by the claim for costs. The evidence is Mr Porima did not respond to Loggertech's attempt to make an alternate arrangement and chose to incur costs pre-emptively when those costs might perhaps have been avoided.

[21] The same approach does not apply to the claim for interest. Interest is to restore the status quo. Loggertech should have moved to address the situation earlier which means, I conclude, interest should be payable. As at todays date, and given the January payment, that amounts to \$64.58 which shall be added to the residual debt.

Conclusion and Orders

[22] For the above reasons I order Loggertech comply with my earlier orders and pay the residual amount plus interest, albeit on an instalment basis. Accordingly I order Loggertech pay Mr Porima:

- (a) \$1,000 (one thousand dollars) no later than Thursday 18 May 2023; and
- (b) A further \$1,000 (one thousand dollars) no later than Friday 16 June 2023; and
- (c) The residue of the amount owing, \$1078.50 (one thousand and seventy eight dollars and fifty cents) , no later than Tuesday 18 July 2023.

[23] In respect to this application costs shall lie where they fall.

[24] Finally and for the sake of completeness Loggertech is reminded that failure to comply could result in further consequences. It is further reminded these orders may yet again be subject to variation but for that to occur the onus is on it to initiate the process and evidence the need for further alteration of the payment schedule.⁵

Michael Loftus
Member of the Employment Relations Authority

⁵ Section 138(3) of the Employment Relations Act 2000