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Rowe v Groganic Fertilisers Ltd AC 23/07 [2007] NZEmpC 50 (14 May 2007)

Last Updated: 25 May 2007

**IN THE EMPLOYMENT COURT
AUCKLAND**

**AC 23/07
ARC 10/07**

IN THE MATTER OF An application for a compliance order

BETWEEN KERRY ROWE
Plaintiff

AND GROGANIC FERTILISERS LTD
Defendant

Hearing: 14 May 2007

(Heard at Auckland)

Appearances: John Dewar, Advocate for Plaintiff
Shona Brown, Agent for Defendant

Judgment: 14 May 2007

ORAL JUDGMENT OF CHIEF JUDGE GL COLGAN

- [1] Kerry Rowe seeks an order against his former employer, Groganic Fertilisers Ltd, for compliance with an order for compliance made by the Employment Relations Authority to enforce the settled terms of Mr Rowe's personal grievance.
- [2] The defendant has been represented at today's hearing by its business development manager who is familiar with the financial affairs of the company although not a shareholder or officer in it. Its position essentially is that it cannot afford to make the payment as agreed to earlier this year, at this stage at least. Ms Brown tells me that there is a financial restructuring exercise currently under way. The company had expected this to have concluded recently but now expects finality within the next few days or a week or so. Frankly, Ms Brown has told the Court in submissions that the company's restructuring plans do not include arrangements for full payment of the debt to the plaintiff.
- [3] In Court today Ms Brown offered an arrangement for payment of the debt at the rate of \$200 per week with a review of that level of payment after 3 or 6 months but after consideration the plaintiff rejected that offer and has elected to pursue its claims for a compliance order and associated orders to enforce that.
- [4] As the Employment Relations Authority's determination in AA14/07 confirms, in the course of an investigation meeting held on 19 January 2007, the parties themselves (Groganic then being represented by counsel) resolved their employment relationship problem and the Authority made a consent order in terms of the settlement signed by the parties on 19 January. These consent orders required Groganic to pay Mr Rowe the sum of \$14,000 and, within 14 days of that agreement, to provide him with a written reference.
- [5] Groganic failed to perform these obligations and, on 2 March under AA56/07, the Authority made a compliance

order noting that in the last week of February Groganic had apologised for not providing the reference and claimed that it then had no funds with which to pay the compensation but would do so when it could. In the Authority's investigation on 2 March Groganic was represented by counsel. Significantly for the purpose of arguments heard by me today, a request was made at the Authority to make payment of the compensation by instalments but the Adjudicator declined to do so and concluded:

The respondent [Groganic] would not have been acting in good faith if it made the agreement knowing that it was not able to pay the amount agreed within a reasonable time.

- [6] The Authority declined to order interest on the compensation but allowed Mr Rowe \$250 costs and disbursements of \$70 being the Authority filing fee. Significantly for today's purposes, the Authority made a compliance order that Groganic was to "(a) pay to the applicant within 14 days of the date of this determination the full agreed amount of \$14,000 compensation; and (b) provide a written reference to the applicant within 7 days of the date of this determination."
- [7] It seems that until very recently and, so far as the plaintiff is concerned, this morning in Court, the defendant has continued to fail to pay the monies due but also to make any formal offer of alternative payment. No appeal or challenge was made to the Authority's decision not to order time payment of the amount due. I am left with the impression that the defendant has hoped that by doing nothing the problem may go away although I acknowledge that it has a number of other pressing financial problems that it has to face. The defendant is one of several companies in common ownership that operates a rural freight and transport business based in the Waikato but elsewhere throughout the North Island as well, that employs about 11 people and has a number of truck and trailer units operating from a depot at Waharoa.
- [8] Although the written reference has now been given by Groganic, no money has been paid to Mr Rowe. I am satisfied that Groganic Fertilisers Ltd has not observed or complied with the Authority's orders made on 2 March 2007. Whether I make a compliance order is a discretionary matter but I am satisfied this is a proper case in which to make such an order under [s139\(2\)](#) of the [Employment Relations Act 2000](#).
- [9] The plaintiff is entitled to costs on today's hearing, disbursements for serving the proceedings and attending at today's hearing, and now to interest on the sum of \$14,000, but as from 16 March 2007, the date by which it was obliged to comply with the Authority's order.
- [10] The following are the Court's orders.

(a) Within 21 days from today, Groganic Fertilisers Ltd is to pay to Kerry Rowe the sum of \$15,438 being a total of compensation of \$14,000, costs in the Authority of \$250, disbursements in the Authority of \$70, costs in this Court that I allow of \$500, the disbursement of the filing fee in this Court of \$300, and \$318 which I am satisfied are reasonable travelling costs in connection with these proceedings. Added to this sum of \$15,438 must be interest calculated at the statutory rate of the 90 day bank bill rate plus 2 percent from 16 March 2007 to the date of payment. The Registrar is to set the rate of interest on a daily basis so calculated and to advise Mr Dewar.

(b) Pursuant to [s140\(5\)](#) I adjourn the proceedings without imposing any penalty or fine or making any final determination to enable the compliance orders that I have just made to be complied with. The adjournment will be to Tuesday 12 June 2007 at 11 am. If, at that time, Groganic has failed to comply with the Court's compliance order, it may face the statutory consequences under [s140\(6\)](#) including a fine not exceeding \$40,000 and/or an order for sequestration of property to meet the debt.

- [11] I have allowed the defendant more time than would normally be given in a case such as this to incorporate the orders just made into its financial restructuring plans and to pay Mr Rowe out.
- [12] Although Ms Brown is the representative of the company and its business development manager and has been present in Court, I make the following points for the benefit of those who must ultimately make the company's decisions.
- [13] Orders of the Employment Relations Authority, no less consent orders, are to be complied with. If, for good reason, such orders cannot be complied with, application can be made to the Authority to vary such orders. The costs of failure to comply only mount as this judgment illustrates. If failure or refusal to comply is because of temporary inability to raise funds, professional assistance should be sought and reasonable proposals for settlement made to Mr Rowe and conveyed to the Court. That did not happen.
- [14] If, as I hope can be the position, this matter is resolved before the next hearing, Mr Dewar should advise the Registrar as soon as possible.

Judgment delivered orally at 2.20 pm on Monday 14 May 2007

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