

[4] Mr Smith seeks orders under s137(1)(iii) of the Act requiring VIPL to comply with the terms of settlement by promptly paying that remaining amount and to pay interest on the amount not paid to him on 25 June 2008.

[5] VIPL has responded to Mr Smith's application by seeking an order under s137(4A) of the Act that it may pay the remaining amount due by instalments. It proposes monthly instalments of at least \$2000 until the debt is paid, that is from November 2008 to April 2009.

[6] The issue for resolution is whether an order for payment by way of instalment should be made.

Payments by instalments

[7] The relevant provisions of the Act are:

“137 Power of Authority to order compliance

(1) ...

(2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, ... that person to do any specified thing ... for the purpose of preventing further non-observance of or non-compliance with that ... order, determination

....

138 Further provisions relating to compliance order by Authority

(1) ...

...

(4) A compliance order of the kind described in s 137(2) –

(a) may be made subject to such terms and conditions as the Authority thinks fit ...; and

...

(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. (my emphasis)

[8] The Authority can make an order for compliance by payment of instalments “only if” it is required because of the financial position of the employer. Hence if the employer's financial position does not so require, the Authority cannot make an order for payment by instalment.

[9] The Act does not define the meaning of ‘requires’ in this context. An earlier determination of the Authority suggests the threshold is high.¹

[10] *The New Zealand Oxford Dictionary* (2005) defines ‘require’ as: “1. need; depend on for success or fulfilment ... 2. lay down as imperative”. Neither definition assists with whether the threshold is as high as – for example – a real and immediate likelihood that the employer’s business will not survive if an order for full payment is made and enforced, or whether the threshold is lower than that. However the appropriate test must, I consider, be more than one of the employer’s convenience or preference even when the employer’s financial position is not strong.

VIPL’s position

[11] Evidence concerning VIPL’s financial position comprised principally a summary of expenses incurred from late 2007 to August 2008 and a spreadsheet of expected costs through to March 2009, including anticipated payments to a number of creditors. This material showed an excess of expenses over income and a shortfall in cash flow.

[12] During the telephone conference Mrs Warren confirmed that three recent staff redundancies had considerably reduced monthly salary expenses. According to a copy of an email Mrs Warren says she sent to Mr Smith on 15 October 2008 the “*benefits of savings*” from those redundancies would allow VIPL to pay a final instalment to Mr Smith by “*no later than 30/11/08*”. The company has since resiled from that position as its director Lance Warren had been ill and was unable to start a new income-generating project planned for November. Mrs Warren told me that the project would now be underway in December.

[13] None of the material provided by the company was independently verified. It represented the company’s assessment of priorities regarding the order and amounts of payments to creditors. For example, the company continues to incur monthly payments on the financing of the lease or purchase of a BMW used by Mr Warren.

¹ See *Stein v Garrard’s (NZ) Limited* (ERA Auckland, AA 287/80, 8 August 2008, Member Monaghan).

[14] While accepting the company is not in a strong financial position, I am not persuaded by the information VIPL has provided that its position does require an order for payment by instalment.

[15] In reaching that conclusion I accept Mr Smith's submission that VIPL has proven recently that it can organise its funds and income to make payments to him when circumstances require. He points to the recent part payment of \$2500 made on 3 November.

[16] He is entitled to the benefit of the finality of settlement agreed with VIPL in April without any further delay. That agreement was for payment in three instalments and he should not be required now to accept to a further schedule of instalments.

Orders for compliance and interest

Compliance

[17] Under s137 and s138 of the Act VIPL is ordered to comply with terms of the 15 April 2008 settlement agreement between the parties by paying to Mr Smith, within 28 days of the date of this determination, the sum of \$10,833.

Interest

[18] Mr Smith has also sought an award of interest on the sum not paid to him on the due date.

[19] The Authority has a discretionary power to award interest in any matter involving the recovery of money: clause 11 of Schedule 2 of the Act. The rate at which interest may be awarded is up to the 90-day bill (as at the date of the order) rate plus two percent. An award may be for some or all of the money and for some or all of the period at issue.

[20] In this case Mr Smith seeks an award at the rate of only 1 per cent for the whole period. However, I think it fit to award interest at the higher rate of 7 per cent for a four-month period from 25 June 2008 when the final payment was due but not

paid. I have limited the period to which interest applies as a part-payment was made in November and there is now an order in place for the payment of the remainder.

[21] VIPL is to pay Mr Smith the additional sum of \$311, being interest on the sum of \$13,333 for a four month period at the rate of 7 per cent. This sum is to be paid within 28 days of the date of this determination.

Costs

[22] Mr Smith also seeks reimbursement of his \$70 fee for lodging his application in the Authority. He is entitled to payment of that amount by VIPL within 28 days of the date of this determination.

Summary of outcome

[23] Within 28 days of the date of this determination, VIPL is to pay to Mr Smith the following sums:

- (i) \$10,833 in final payment of the amount agreed by the settlement agreement of 15 April 2008; and
- (ii) \$311 in interest for a four month period on the amount not paid on 25 June 2008.
- (iii) \$70 in reimbursement of his fee for lodging this matter in the Authority.

[24] If VIPL fails to comply with the Authority's determination, Mr Smith may apply to the Employment Court for further orders. The Court has powers to order imprisonment, fines up to \$40,000, and sequestration of property.

Robin Arthur
Member of the Employment Relations Authority