

(b) an order for costs in favour of Ms Stein.²

[2] Requests have been made for payment, but no payments have been received. Accordingly, under s 137(1) of the Employment Relations Act 2000 Ms Stein seeks orders for compliance with the orders contained in both determinations.

Payment by instalments

[3] Garrard's has offered to make payment by instalments of \$1,000 per month. Ms Stein has declined that offer and seeks orders for payment in full. Accordingly this determination focuses on whether an order for payment by way of instalment should be made.

[4] Relevant provisions in the Employment Relations Act 2000, 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

(b) ...

(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] With reference to s138 (4A) in particular, the issue between the parties has focussed on whether the financial position of the employer requires that any compliance order be for the payment of the outstanding amounts by instalment.

² **Stein v Garrard's (NZ) Limited**, AA94A/08, 10 April 2008 (“the 10 April determination”)

[6] The Authority can make such an order ‘only if’ the financial position of the employer does so require. Hence if the financial position of the employer does not so require, then the Authority cannot make an order for payment by instalment.

[7] There is no authority on the meaning of ‘requires’ in this context. I indicated to the parties a view that the threshold was high, but the point was not otherwise the subject of any submission.

[8] The Concise Oxford Dictionary defines ‘require’ as : “... 2. Lay down as an imperative. 3. Need, depend for success, fulfilment, etc, on ...” Neither assists with whether the threshold is as high as a real and immediate likelihood that the employer’s business will not survive if an order for full payment is made and enforced for example, or whether the threshold is lower than that. However, I do consider the appropriate test is more than one of the employer’s convenience or preference even when the employer’s financial position is not strong.

[9] Evidence concerning Garrard’s financial position amounted principally to the draft financial statements for the year ended 30 June 2008. That information is commercially sensitive and I confirm my order that its contents are not to be published by any person. There was also a message from the company’s accountant asserting that a debt in the amount owed to Ms Stein would place a strain on the company’s finances, and that the company trades through the financial support provided by its Australian parent.

[10] The draft accounts show that Garrard’s has had a trading deficit for the last two years at least. They also show the company has reasonably significant assets, but its liabilities exceed its assets. The greatest liability by far would appear to be its debt to its parent. I was told, too, that the company is attempting to trade out of its difficulties.

[11] All of this suggests that, regardless of the present matter, the company’s current financial position depends on the willingness of its shareholder to continue to provide financial support. I have no information to suggest that in general it is not willing or not able to continue doing so. In addition I have no information to suggest

that from an objective point of view the debt comprised in the present matter would make a difference to the position in principle, although I accept the further debt may create a strain. However I do not accept that the creation or addition of a strain is enough to reach the threshold in s 138 (4A).

[12] All of this leaves me with an acceptance that the company is not in a strong financial position, but not persuaded that the position 'requires' an order for payment by instalment.

[13] Garrard's is therefore ordered to comply with the Authority's determinations of 17 March and 10 April by paying to Ms Stein;

- (a) \$3,365.38 (gross) as reimbursement of lost remuneration;
- (b) \$4,000 as compensation for injury to feelings;
- (c) \$3,651.02 (gross) as holiday pay;
- (d) \$204.93 as reimbursement for her payment of road user charges; and
- (e) \$3,500 as costs.

[14] Payment is to be made in full within 7 days of the date of this determination.

Costs

[15] Mr Podwin sought an order for full solicitor and client costs in respect of this application.

[16] Mr Patterson suggested a contribution in the sum of \$300 would be appropriate, particularly as the investigation meeting and subsequent conference call were both extremely short.

[17] The request for an order for full solicitor and client costs concerns the amount of time Mr Podwin spent engaging in emailed exchanges with Garrard's then-advocate in an attempt to obtain payment, as well as the overall failure to meet the orders in favour of Ms Stein. I do not accept there is sufficient in that to require an order for full solicitor and client costs. This is particularly so because, when the

matter was taken up with the company's shareholder directly, the offer of payment by instalment was made. In making the present determination I have not found the company's position on this point unreasonable, rather that it has not reached the threshold in s 138 (4A).

[18] Garrard's is therefore further ordered to pay costs in respect of this application in the sum of \$300 plus the \$70 filing fee.

R A Monaghan

Member of the Employment Relations Authority