

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 369/10  
5311509

BETWEEN	ANITA ZHAO Applicant
AND	HEALTH AND BODY CLINIC LIMITED First Respondent
AND	MURRAY ARNESEN Second Respondent
AND	LYNETTE ARNESEN Third Respondent

Member of Authority:	Vicki Campbell
Representatives:	Rebekah Smith for Applicant No appearance for First Respondent Mere King for Second and Third Respondents
Investigation Meeting:	On the papers
Submissions Received:	6 and 16 August 2010 from Applicant 13 August 2010 from Second and Third Respondents
Determination:	19 August 2010

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**DETERMINATION OF THE AUTHORITY**

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[1] On 6 July 2010 Ms Zhao lodged a statement of problem seeking orders from the Authority that the First Respondent complies with the Authority's determinations numbered AA144/10 and AA144A/10, and/or that the Second and Third Respondents be compelled to cause the First Respondent as its directors to comply with the orders.

[2] In its determinations the Authority made the following orders:

- Health and Body Clinic Limited pay to Ms Zhao \$143.00 being reimbursement of lost wages for unjustified disadvantage and pursuant to s 123(1)(b) of the Employment Relations Act ("the Act");

- Health and Body Clinic Limited pay to Ms Zhao \$6,511.92 pursuant to s 123(1)(b) of the Act;
- Health and Body Clinic Limited pay to Ms Zhao the sum of \$4,000 pursuant to s 123(1)(c)(i) of the Act; and
- Health and Body Clinic Limited pay to Ms Zhao the sum of \$3,416.15 as a contribution to Ms Zhao's costs.

[3] The applicant seeks orders of compliance not only against the First Respondent, but seeks an order that the Second and Third Respondents as directors of Health and Body Clinic Limited be required to ensure payment is made.

[4] No statement in reply has been received by the First Respondent. A statement in reply was lodged on behalf of the Second and Third Respondents on 23 July 2010 in which the respondents opposed the making of compliance orders against them.

[5] Mr Arnesen, who represented the First Respondent at the Authority's investigation meeting for the substantive issues, was advised that as no statement in reply had been received from the First Respondent, it would require the leave of the Authority to respond or defend the matter. During a telephone conference call on 30 July 2010 Mr Arnesen advised the Authority that Health and Body Clinic Limited would not be defending the matter.

[6] Also during the conference call on 30 July the representatives present on the call consented to the matter of the compliance issues being dealt with on the papers.

[7] Prior to the hearing of the substantive issues the Authority had been advised that the business of Health and Body Clinic Limited had been sold and steps were being taken to remove the company from the Companies Register. On the day of the investigation meeting and again on issuing the substantive determination, checks of the Companies Register confirmed that Health and Body Clinic remained registered as a legal entity. A check of the register today, confirms Health and Body Clinic remains a registered company.

### **Application for compliance against First Respondent**

[8] Section 137 of the Act provides the Authority with the power to order compliance where any person has not complied with a determination of the Authority

and, where that non-compliance has been ongoing, to order the person to cease the non-compliance.

[9] The Authority is satisfied Ms Zhao has not received any payments in respect of the amounts ordered to be paid to her by the First Respondent in both determinations AA144/10 and AA144A/10 and that this non-compliance continues.

[10] There has been no opposition by Health and Body Clinic Limited to the making of a compliance order against it by the Authority.

**[11] I order Health and Body Clinic Limited to comply with the Authority's Determinations numbered AA 144/10 and 144A/10 dated 26 March and 2 June 2010 respectively, and to do so by 27 August 2010.**

#### **Jurisdiction to make orders against non-parties to original proceedings**

[12] Mr and Mrs Murray and Lynette Arnesen are two of the three named Directors of Health and Body Clinic Limited. Neither Mr nor Mrs Arnesen were party to the original proceedings in the Authority.

[13] Section 137(4) of the Act permits a person affected by the non-compliance of a determination to take action against another person by applying to the Authority for an order to do any specified thing or to cease doing any specified activity for the purpose of preventing further non-compliance.<sup>1</sup>

[14] Pursuant to ss 137(2) and (4) Ms Zhao seeks an order from the Authority that Mr and Mrs Arnesen cause the payments to be made. A number of decisions of the Employment Tribunal, Employment Relations Authority and the Employment Court have been considered in coming to my conclusions under this heading.<sup>2</sup>

[15] In the cases reviewed for this determination the predominant approach taken by both the Employment Court and the Tribunal/Authority has been to refuse to make the order sought where it would be impossible in view of a hopeless financial situation to make the orders sought. In those cases the companies were either in liquidation or

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<sup>1</sup> See also Employment Relations Act 2000, section 137(2).

<sup>2</sup> For example - *Smith v Pacific Palms International Resort & Golf Club Ltd & Cribb*, 5 August 2008, Auckland Employment Relations Authority, AA 280/08; *Northern Clerical IUOW v Lawrence Publishing Co of NZ Ltd* [1990] 1 NZILR 717; *McLennan v Internet Productions Limited* [2003] 1 ERNZ 282.

receivership. In the cases where the order was granted, there was no evidence to show the director was not in a position to cause the payment to be made.

[16] With regard to Health and Body Clinic Limited, Mr Arnesen has advised the Authority that the business has sold. The accounts provided to the Authority, have not been audited, but more importantly do not contain any information about the sale and do not show the proceeds of the sale.

[17] While no order can be made rendering Mr and Mrs Arnesen personally liable for the payments I have concluded there is no evidence to indicate Mr and Mrs Arnesen are not in a position of power to cause payment to be made. The Second and Third Respondents are therefore ordered to take steps to cause the payments to be made under the orders in [11] above.

### **Costs**

[18] Costs are reserved. In the event that costs are sought, the parties are encouraged to resolve that question between them. If the parties fail to reach agreement on the matter of costs, Ms Zhao may lodge and serve a memorandum as to costs within 28 days of the date of this determination with any reply submissions being lodged within 14 days of receipt. I will not consider any application outside that timeframe.

Vicki Campbell  
Member of Employment Relations Authority