

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

AA 280/08  
5124778

BETWEEN                      BRUCE WALTON SMITH  
   Applicant

AND                              PACIFIC PALMS  
   INTERNATIONAL RESORT  
   & GOLF CLUB LIMITED  
   First Respondent

   ROBERT CLIFFORD HOANI  
   CRIBB  
   Second Respondent

Member of Authority:      R A Monaghan

Representatives:            D Jacobson, Counsel for Applicant  
   S Hood, Counsel for Respondents

Investigation Meeting:      14 July 2008 at Hamilton

Supplementary affidavit      23 July 2008  
filed:

Submissions received:      24 July 2008 from Applicant  
   24 July 2008 from Respondent

Determination:                5 August 2008

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**DETERMINATION OF THE AUTHORITY**

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**Employment relationship problem**

[1]      Bruce Walton Smith seeks orders that:

- (a) the Pacific Palms International Resort & Golf Club Limited (“PPIRGCL”) comply with orders of the Authority in its determination in **Bruce Walton**

**Smith v Pacific Palms International Resort & Golf Club Limited**<sup>1</sup>, namely that PPIRGCL pay to Mr Smith:

- (i) the gross sum of \$72,000 as reimbursement;
- (ii) the gross sum of \$15,000 as compensation;
- (iii) the gross sum of \$117,750 as arrears of wages; and
- (iv) interest on the sum of \$117,750 at the rate of 10% per annum from 2 October 2006 until the date of payment; and

(b) Robert Clifford Hoani Cribb, as sole shareholder and director of PPIRGCL, cause the above payments to be made by 30 May 2008.

[2] PPIRGCL opposes the application on the grounds that:

- (a) the 16 April determination has been challenged in the Employment Court, and no order for compliance should be made pending the decision on the challenge; and
- (b) the application is an inappropriate attempt to use the compliance order process for debt collection.

### **The challenge in the Employment Court**

[3] The 16 April determination was challenged in the Employment Court by statement of claim dated 13 May 2008. A reference in the determination to PPIRGCL's failure to comply with a direction to attend mediation caused the court to request a report from the Authority under s 181 of the Employment Relations Act 2000. The request was made in a minute dated 19 May 2008.

[4] The report was filed in the court on 4 July 2008. On the information available to me, the court has sought submissions from the parties on the implications of the report for the conduct of the challenge. That matter has not been finalised and no date has been set for a hearing.

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<sup>1</sup> 16 April 2008, AA 141/08, referred to as 'the 16 April determination'.

[5] As at the date of the investigation meeting, no application for a stay of the 16 April determination had been filed in the court. To date, no application for a stay has been filed in the Authority.

[6] The mere filing of a challenge does not operate as a stay. An argument to contrary effect was pursued on behalf of PPIRGCL and Mr Cribb in oral submissions during the investigation meeting. I understood it to be raised in support of the wider submission that the Authority should not make an order for compliance pending the decision on the challenge. To the extent it is necessary to do so, I refer to s 180 of the Act which reads:

“The making of an election under s 179 does not operate as a stay of proceedings on the determination of the Authority unless the Court, or the Authority, so orders.”

[7] There has been no order of the kind referred to in this provision.

#### **Use of compliance process for debt collection**

[8] Oral submissions were also made in respect of the position that the present application amounts to an inappropriate use of the compliance process for debt collection. There was an associated submission to the effect that the compliance order process is not, or should not be, available in respect of matters such as the application here.

[9] Further to that, it was submitted on behalf of PPIRGCL and Mr Cribb that there was no order of the Authority with which compliance could be sought. A decision of the Labour Court in **Wellington District Hotel, etc, IUOW v Wellington Hospital Board**<sup>2</sup> was cited in support. The court was addressing an application for an order that the respondent comply with an earlier decision of the court's in respect of a claim for sick pay made on behalf of two employees. However the application for compliance extended to a broad requirement that all workers covered by the relevant sick leave provision receive 'all the pay' they would have received in certain broadly-stated circumstances. Meanwhile the individuals concerned in the original decision had received their payments. The court found the broader matter was not appropriate

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<sup>2</sup> [1989] 1 NZILR 308

for an order for compliance. No order had been made in respect of it. No comparable circumstances exist here.

[10] Here the orders of the Authority were contained in the 16 April determination. The orders and the determination are enforceable under the compliance order procedure by virtue of s 137 of the Act, which reads in part:

“(1) This section applies where any person has not observed or complied with –  
(a) ....  
(b) any order, determination, direction, or requirement made or given under this Act by the Authority or a member or officer of the Authority.”

[11] PPIRGCL has not complied with the orders for payment Mr Smith has identified. Nor, by extension, has it complied with the Authority’s determination.

[12] There was also a submission on behalf of PPIRGCL and Mr Cribb that orders for compliance should be made only sparingly, given the ultimate sanctions contained in s 140(6) of the Act. The provision reads as follows:

“(6) Where any person fails to comply with a compliance order made under s 139, or where the Court, on an application under s 138(6), is satisfied that any person has failed to comply with a compliance order made under s 137, the Court may do 1 or more of the following things:  
(a) ...  
(b) if the person in default is a defendant, order that the defendant’s defence be struck out and that judgment be sealed accordingly;  
(c) order that the person in default be sentenced to imprisonment for a term not exceeding 3 months;  
(d) order that the person in default be fined a sum not exceeding \$40,000  
(e) order that the property of the person in default be sequestered.”

[13] Sanctions are available on application under this provision when a person has failed to comply with an order made by the Court under s 139, or when a person has failed to comply with an order for compliance made by the Authority. In the present circumstances they might apply in the event that I made an order for compliance as a result of the present application, one or both of PPIRGCL and Mr Cribb failed to

observe applicable terms of the order, and Mr Smith made further application to the court under s 140. Mr Smith would then have to persuade the court as to the appropriateness of any sanction sought, and undoubtedly the court would be influenced in its decision by the need for compelling evidence in the face of such potentially serious consequences. Against such a background I consider it premature to give any significant weight to the existence of such sanctions in determining the present application.

[14] Moreover, I do not accept the generalised submission that compliance orders should be made only sparingly in the light of these sanctions. Indeed as a matter of practice they are a commonly used and effective means of enforcing determinations or orders of the Authority, as well as the other matters listed in s 137. The real issue here is whether in all of the present circumstances the Authority should exercise its discretion in favour of making the orders sought.

[15] Finally, reliance was placed on a decision of the Labour Court in **NDU v Mildon**<sup>3</sup>. The Labour Court criticised the application before it as being nothing more than a debt collecting action. However it did so because the application arose out of an allegation that Mildon had breached the applicable award by failing to remain a member of the applicant union. The court saw the application as an attempt to secure payment of the union membership subscription and commented accordingly. The facts are readily distinguishable from those in the present application.

[16] Accordingly I do not accept that Mr Smith's application for orders for compliance amounts to an inappropriate use of the compliance order process for debt collection. Nor do I accept any submission to the general effect that the compliance order process is not, or should not be, available here. The process is available to Mr Smith as a means of enforcing the 16 April determination.

### **The Authority's discretion to make an order for compliance**

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<sup>3</sup> [1989] 3 NZILR 20

[17] The mere failure to comply with an order of the Authority does not of itself mean an order for compliance will follow. It is settled law that the Authority has a discretion as to whether to make an order, and must exercise the discretion in a principled way.

[18] A decision of the Labour Court in **Grant v Superstrike Bowling Centres Limited**<sup>4</sup> was cited in support of a submission on behalf of Mr Smith that the orders for compliance should be made unless there is good reason not to make them. However the **Superstrike** decision was made under the transitional provisions of the Employment Contracts Act 1991. It concerned compliance with the terms of an employment contract where the applicable legislation expressly provided that orders for compliance were to be the primary remedy.

[19] The sum of money involved here is so substantial that it is a relevant consideration in assessing the best way to do justice between the parties.

[20] It was said in written submissions on behalf of PPIRGCL that I should not exercise the discretion to grant orders that are oppressive or cannot be complied with at the present time. Those may be relevant considerations, but I had drawn attention at the investigation meeting to the lack of any financial information from Mr Cribb and PPIRGCL. I required more detailed information, which was to be filed by affidavit. Mr Cribb voiced concerns about the confidential nature of such material, and was advised the matter could be addressed by the provision of suitable undertakings from counsel and an order from the Authority prohibiting the publication of the material.

[21] I also drew attention to s 138 (4A) of the Act. The provision sets out the test the Authority is to use if it is considering making an order for payment by instalments. In that respect, although the ability to pay is relevant, I do not accept the submission on behalf of PPIRGCL and Mr Cribb that the financial position of PPIRGCL is a mandatory statutory consideration in relation to the overall discretion to grant a compliance order.

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<sup>4</sup> [1992] 1 ERNZ 727

[22] Unfortunately the resulting affidavit from Mr Cribb was less than a page in length. It annexed a letter from an accountant also of less than a page, together with a one-page document purporting to be a statement of PPIRGCL's assets and liabilities as at 30 June 2008. The information was far too thin to be of any assistance. The provision of significantly more detailed information of the kind discussed at the investigation meeting might have had more persuasive value.

[23] Further, the availability of an application for a stay was canvassed during the investigation meeting. There did not appear to be any will to make such an application. However if I declined to make the compliance orders sought then, and in the absence of any attempt to invoke any other method of enforcement, the practical effect would be similar to an order for a stay.

[24] Overall, the current state of affairs is unsatisfactory. The indication from Mr Cribb is that he has no intention of causing Mr Smith to be paid at least until after the challenge has been heard and decided, and the indication from the slight amount of financial information available is that he will take the position that PPIRGCL has no funds it can make available to pay Mr Smith. The latter is the position he has taken with respect to the present application.

[25] On the other hand, pending any decision to contrary effect, Mr Smith is entitled to the fruits of his victory in the Authority. At the very least, he is entitled to ask that some attempt be made to preserve those fruits pending any further order. I would say, too, that in the light of what Mr Cribb is portraying as the uncertain financial position of PPIRGCL, adding interest to any amount ultimately found to be owed to Mr Smith is unlikely to be sufficient to counter the effects of any delay in payment to him.

[26] Overall the response to Mr Smith's requests for payment has not been satisfactory. As already indicated in this determination the legal argument advanced in respect of the application of the compliance order procedure is not accepted, while the financial information provided has been inadequate.

[27] For these reasons I make the following orders:

[28] PPIRGCL is ordered to comply with the 16 April determination by paying to Mr Smith or his nominee:

- (i) the gross sum of \$72,000 as reimbursement;
- (ii) the gross sum of \$15,000 as compensation;
- (iii) the gross sum of \$117,750 as arrears of wages; and
- (iv) interest on the sum of \$117,750 at the rate of 10% per annum from 2 October 2006 until the date of payment.

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

[30] The above orders also apply to Mr Cribb on the basis I now set out.

#### **Application in respect of Mr Cribb**

[31] The application for an order in respect of Mr Cribb was made in reliance on a decision of the Labour Court in **Northern Clerical etc IUOW v Lawrence Publishing Co of New Zealand Limited**<sup>5</sup>. There a payment had been ordered in respect of an employee's personal grievance. An order for compliance with that order was sought against the original party and two further parties (being the managing director who was also the major shareholder in the parent company, and the parent company).

[32] The court ordered the managing director to make the payment as agent of the original party, and the parent company to advance to the other parties such funds as may be necessary in order to enable the payment. The intention of the order was that the parties:

“... not .. make the payment ... from their own pockets, but to take the steps which were in their power to ensure that the liability was met by the person upon whom liability fell. ...”

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<sup>5</sup> [1990] 1 NZILR 717; ERNZ Sel Cas 667

And the court said:

“... such an order appears to me to be within the competence of the court and to be one which in the exercise of its discretion under s 207(2) [of the Labour Relations Act 1987] the court is fully empowered to make.”<sup>6</sup>

[33] I drew the parties’ attention to a decision of the Employment Court in **McLennan v Internet Productions Limited (in Liq)**<sup>7</sup> and invited them to address me on it.

[34] The case was an appeal from a decision of the Employment Tribunal. The Tribunal had declined to make an order for compliance with orders in respect of an unjustified dismissal against the sole director and shareholder of the original party. I accept it is distinguishable in that the liquidation of the original party meant the director/shareholder was not in law in a position to take the steps necessary to ensure the original party made payment to the applicant. However there has not been any suggestion here that Mr Cribb is not in law in a position to take the steps necessary to ensure PPIRGCL makes payment.

[35] Otherwise the court observed that s 55(2) of the Employment Contracts Act (being the applicable provision):

“[38] ... allows person A to bring proceedings for a compliance order against person B where person A is prejudicially affected by person C’s non-observance or non-compliance with an order of the Employment Tribunal that person C pay compensation to person A.”

And

“[40] ... It should be noted that in such cases the terms of the compliance orders have been to ensure that the original party complies with the orders being enforced, not that the joined parties should themselves comply, for example, by personally paying sums of money ordered.”<sup>8</sup>

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<sup>6</sup> P 722; p 672

<sup>7</sup> [2003] 1 ERNZ 282

<sup>8</sup> P 290

[36] The comparable provision in the Employment Relations Act is s 137(4):

“(4) The following persons may take action against another person by applying to the Authority for an order of the kind specified in subsection (2):

- (a) any person (being an employee, employer, union, or employer organisation) who alleges that that person has been affected by non-observance or non-compliance of the kind described in subsection (1):
- (b) ...”

[37] Importantly, the action in question may be taken ‘against another person’. I do not consider that wording differs materially from s 55(2), which permitted such action against ‘any other person’. Accordingly the earlier line of cases still applies.

[38] Here, Mr Cribb is the sole director and shareholder of PPIRGCL. The submission on his behalf was that, as he is not the party liable to make payment to Mr Smith, no order rendering him personally liable can be made. However Mr Smith has sought an order that Mr Cribb cause the payment to be made, not that he be made personally liable. The extent to which such an order can be made is as set out above.

[39] There is no material to indicate that for some reason in fact Mr Cribb has no power to take steps to cause payment to be made. He is therefore ordered to take steps to cause payments to be made under the orders in [28] and [29] above.

### **Costs**

[40] Costs are reserved. If either party wishes to address me on the matter they may do so by the filing and service of memoranda within 28 days of the date of this determination. If either wishes to reply to the other there shall be a further 3 working days from the date of receipt of the relevant memorandum in which to file and serve such reply.

R A Monaghan

Member of the Employment Relations Authority