

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE**

[2019] NZERA 276
3052133

BETWEEN	SOPHIE MCKEICH First Applicant
AND	SHANE HANSON Second Applicant
AND	DDUP NZ LIMITED Respondent

Member of Authority: Michael Loftus

Representatives: Greg Lloyd, counsel for Applicant
No appearance for Respondent

Investigation Meeting: 9 May 2019 at Wellington

Oral determination: At the investigation

Written record issued: 9 May 2019

ORAL DETERMINATION OF THE AUTHORITY

[1] This is an application for a compliance order pursuant to s 137 of the Employment Relations Act 2000. The applicants also ask that DDUP be penalised for the failures that underpin the compliance application.

[2] DDUP's position is unknown as it has steadfastly avoided meaningful participation in the Authority's process in respect to both this application and the substantive one to which it relates. Those endeavours, or more correctly the lack thereof, include non-attendance at today's investigation and that raises a question as to whether or not I proceed.

[3] All companies are required to have an address for service.¹ DDUP's is 65 Cuba Street, Wellington. The evidence satisfies me a Notice of Investigation Meeting was served at that address during the afternoon of 17 April 2019.

[4] The notice of meeting includes advice that should a respondent fail to attend the Authority may proceed and issue a determination in favour of the applicants² DDUP should therefore be aware of the consequences of non-attendance. Given the absence of either notice of, or an explanation for, DDUP's absence along with its history of uncooperative behaviour I consider it appropriate to continue.

[5] On 8 November 2018 I issued a determination in which I found both applicants had a personal grievance for unjustified dismissal and both were due unpaid wages.³

[6] As a result I ordered DDUP pay the first applicant, Sophie McKeich, various sums totalling \$52,540. The payment to the second applicant, Shane Hanson, totalled \$53,040 and both were to be made no later than 4.00pm Friday 23 November 2018.

[7] The evidence satisfies me that, as claimed, no payments have been made. It follows the compliance order sought by the applicants will be granted.⁴

[8] Turning to the penalty claim. While I have sympathy with applicant's plight and consider DDUP's behaviour when responding to their claims warrants censure a penalty cannot be imposed.

[9] The Authority is a creature of statute and can only exercise powers granted by the Act. The Authority's jurisdiction in relation to penalties is confined to breaches of either an employment agreement or provisions of the Act which specifically provide for the imposition of a penalty.⁵

[10] I can find nothing in the Act's provision that relate to determinations or their content that suggests I can consider a penalty for non-compliance and nor can Mr Lloyd point me to one. I cannot do something I am not authorised to do.

¹ Section 192(1) of the Companies Act 1993

² Note 2 to Form 8 of the Employment Relations Authority Regulations 2000

³ [2018] NZERA Wellington 102

⁴ Section 137(1)(a)(ii) of the Employment Relations Act 2000

⁵ Section 133 of the Employment Relations Act 2000

[11] Finally there are costs. These total \$2,500 and the applicant's seek reimbursement on an indemnity basis. In considering the grounds for contemplating indemnity costs I note one is conduct that causes loss of time to the court and to other parties.⁶

[12] I consider DDUP's conduct throughout the history of this litigation fulfils that definition and there are aggravating features there-to. This is one of those rare occasions upon which indemnity costs should be granted.

Conclusion and Orders

[13] For the above reasons I order the respondent, DDUP NZ Limited, comply with the orders contained in *McKeich & Hanson v DDUP NZ LTD* [2018] NZERA Wellington 102.

[14] In particular DDUP NZ Limited is ordered to pay Sophie McKeich:

- a. \$28,800.00 (twenty eight thousand, eight hundred dollars) gross as recompense for wages lost as a result of the dismissal; and
- b. A further \$15,000.00 (fifteen thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i); and
- c. A further \$4,240.00 (four thousand, two hundred and forty dollars) gross being unpaid wages; and
- d. A further \$4,500.00 (four thousand, five hundred dollars) as a contribution toward the costs incurred in pursuing the claim.

[15] DDUP NZ Limited is also ordered to pay Shane Hanson:

- a. \$33,600.00 (thirty three thousand, six hundred dollars) gross as recompense for wages lost as a result of the dismissal; and
- b. A further \$15,000.00 (fifteen thousand dollars) as compensation for humiliation, loss of dignity and injury to feelings pursuant to section 123(1)(c)(i); and

⁶ *Westpac Banking Corporation* [2009] 3 NZLR 400

- c. A further \$4,440.00 (four thousand, four hundred and forty dollars) gross being unpaid wages.

[16] To that is added a further \$2,500 (two thousand, five hundred dollars) DDUP is ordered to pay to Ms McKeich as reimbursement of costs incurred in making this application.

[17] As I have no confidence these orders will be complied with I consider a very short time appropriate if, for no other reason, than to allow the applicants to progress this matter in the Employment Court where they will have access to greater range of options and remedies. Here I note Mr Lloyd's assurance a copy of this determination can be delivered to DDUP within an hour.

[18] I therefore order DDUP comply with above orders (paragraphs [13] to [16] inclusive) no later than 1.00pm on Friday 10 May 2019.

[19] In closing I advise the respondent and its director of two further points. The first is as parts of this determination involve unpaid wages the director may be held personally liable for that debt.⁷ The second is continuing failure may result in further consequences that could potentially include the imposition of fines, the sequestration of property and/or imprisonment.

Michael Loftus
Member of the Employment Relations Authority

⁷ Sections 142W and 142Y of the Employment Relations Act 2000