**IN THE EMPLOYMENT RELATIONS AUTHORITY**
**AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI**
**TĀMAKI MAKAURAU ROHE**

[2020] NZERA 229
3100332

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| BETWEEN | LESTER BRETT ANTHONY ROBINSON<br>Applicant |
| AND | A-Z RIGGING & SCAFFOLDING LIMITED<br>Respondent |

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| Member of Authority: | Jenni-Maree Trotman |
| Representatives: | Rachel Webster, counsel for the Applicant<br>Dudley Hoskin, for the Respondent |
| Investigation Meeting: | 8 June 2020 by telephone |
| Submissions and further Information Received: | 10 June 2020 from Respondent |
| Date of Determination: | 15 June 2020 |

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## DETERMINATION OF THE AUTHORITY

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### Employment Relationship Problem

[1] This determination addresses an application by Lester Robinson for an order that A-Z Rigging and Scaffolding Limited comply with orders made by the Authority in a determination dated 13 March 2020. Of relevance to the present application was a finding in that determination that A-Z Rigging and Scaffolding pay Mr Robinson an amount of $9,430 being made up of lost wages, compensation under s 123(1)(c)(i) of the Employment Relations Act 2000 (the Act), and a sum unlawfully deducted from his wages.

[2] A-Z Rigging and Scaffolding acknowledges that it has breached the orders made by the Authority by failing to pay Mr Robinson the amount ordered. However, it

maintains that due to its perilous financial position the Authority should order it to pay the amount found payable to Mr Robinson by way of instalment pursuant to s 138(4A) of the Act.

**The process**

[3] During a case management conference call with the parties' representatives, it was agreed that this matter would be heard on the papers. To facilitate this, A-Z Rigging and Scaffolding agreed to file an affidavit by 25 May 2020 providing evidence supporting its claim that its financial position necessitates payment to Mr Robinson in instalments. A timetable was set for Mr Robinson to provide any reply affidavit.

[4] On 25 May 2020 the Authority was advised by A-Z Rigging and Scaffolding's Counsel that she no longer represented the Company. Notwithstanding this, she provided the Authority with what was said to be the Company's profit and loss statement for April 2020.

[5] In the circumstances, the Authority notified the parties that an investigation meeting, to be conducted by way of telephone, would take place. They were advised that the purpose of the investigation was to have A-Z Rigging and Scaffolding affirm the contents of the April 2020 profit and loss statement produced to the Authority and to answer any questions on this statement and its means to pay the amounts previously determined by the Authority. Dudley Hoskin, A-Z Rigging and Scaffolding's director, appeared at the investigation meeting on its behalf.

[6] As permitted by 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made but has not recorded all evidence and submissions received.

**The issues**

[7] The issues requiring investigation and determination are:

a) Has A-Z Rigging and Scaffolding failed to comply with the Authority's determination dated 13 March 2020?

b) If so, should compliance be ordered by way of instalment payments?

c) Should either party contribute to the costs of representation of the other party?

**Issue one: Has A-Z Rigging and Scaffolding failed to comply with the Authority's determination?**

[8] There is no dispute that A-Z Rigging and Scaffolding has failed to comply with the Authority's determination. It has failed to pay any of the amounts ordered to be paid to Mr Robinson within 28 days of the date of the determination. These amounts total $9,430 calculated as follows:

i. The sum of $4,410 gross for lost wages;

ii. The sum of $5,000 pursuant to s 123(1)(c)(i) of the Act.

iii. The sum of $20 pursuant to s 11 of the Wages Protection Act.

[9] In the circumstances, it is appropriate that a compliance order is made.

**Issue two: Should compliance be ordered by way of instalment payments?**

[10] Section 138(4A) of the Act provides that the Authority may order compliance, in respect to payment of a sum of money to an employee, by ordering payment by instalments "but only if the financial position of the employer requires it".

[11] In the Authority's 13 March 2020 determination I found:[1]

> A review of the profit and loss reports show a 50% drop in the Company's income between November 2018 and December 2018. While its income did increase slightly in January 2019, it remained around 35% lower than its November income through until February 2019 before falling further during 2019. The Company's ongoing monthly reports generally show the Company suffering loss for most months between Lester's termination and the Authority's investigation. To survive the Company has had to take out loans that I was told had to be secured in part over Dudley's personal assets.

[12] Mr Hoskin said that the financial situation of the Company has not improved since the Authority's last investigation. Although acknowledging that the Company made a profit for the month of March, he said that this profit was used to pay outstanding debts that had accrued in the previous months where the Company had

[1] At [43].

suffered losses. He explained that matters have deteriorated since March in light of COVID-19 restrictions and the limited ability of the Company to trade.

[13] A-Z Rigging and Scaffolding's profit and loss statements support Mr Hoskin's evidence of the financial position of the Company for the months of April and May 2020. These show a net loss of just over $90,000 for April and $8,306.76 for May. The receipt by the Company of the Government's wage subsidy significantly mitigated these sums.

[14] Mr Hoskin said that the forecast for on-going trading was similarly bleak. He only has one day of forward work currently booked in his diary. While the Company is quoting for work, he anticipates being undercut by other companies trying to stay afloat.

[15] Mr Hoskin acknowledged that the Company applied for a Small Business Cashflow Loan. This Loan Scheme was introduced by the Government to support businesses and organisations struggling because of loss of actual or predicted revenue as a result of COVID-19. Documentation produced by A-Z Rigging and Scaffolding shows that the Company secured an amount of just over $60,000 under this Scheme that it used to pay IRD (GST arrears and PAYE), ACC, and outstanding creditors.

*Finding on issue two*

[16] It is appropriate that the Authority make a compliance order requiring A-Z Scaffolding and Rigging to comply with the Authority's determination. I am satisfied that A-Z Rigging and Scaffolding's financial position requires payment of the amount outstanding to Mr Robinson by way of instalments.

[17] A-Z Scaffolding and Rigging is ordered to comply with the Authority's determination by paying Mr Robinson the sum of $9,460 by way of 18 fortnightly payments of $500 and 1 final payment of $460. Payments must commence on or before 26 June 2020.

**Issue three: Costs**

[18] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[19] If they are not able to do so, and an Authority determination on costs is needed, Mr Robinson may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum A-Z Scaffolding and Rigging will then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[20] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.[2]

**Outcome**

[21] The following orders are made:

a) A-Z Scaffolding and Rigging Limited has failed to comply with the Authority's determination dated 13 March 2020.

b) A-Z Scaffolding and Rigging Limited must comply with the Authority's determination dated 13 March 2020 by paying Lester Robinson the sum of $9,460 by way of 18 fortnightly payments of $500 and 1 final payment of $460. Payments must commence on or before 26 June 2020.

c) Costs are reserved

Jenni-Maree Trotman
Member of the Employment Relations Authority

[2] *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].