

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

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

[2020] NZERA 525  
3110601

BETWEEN	JAMES HIGGS Applicant
AND	BR & SL PORTER LIMITED Respondent

Member of Authority: Vicki Campbell

Representatives: Paul Matthews, advocate for Applicant  
Mark Beech, counsel for Respondent

Investigation Meeting: On the papers

Submissions Received: 24 September 2020 from Applicant  
21 September and 16 October 2020 from Respondent

Determination: 18 December 2020

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**THIRD DETERMINATION OF THE AUTHORITY**

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- A. The application for a penalty is declined.**
- B. BR & SL Porter Limited is ordered to pay to Mr Higgs interest in the sum of \$46.54 within 14 days of the date of this determination.**
- C. BR & SL Porter Limited is ordered to pay costs of \$821.56 within 14 days of the date of this determination.**

## **Employment relationship problem**

[1] The Authority has issued two previous determinations resolving Mr Higgs' employment relationship problems.<sup>1</sup> On 10 December 2019 BR & SL Porter Limited (Porters) challenged the substantive determination by filing a statement of claim with the Employment Court. At the same time Porters sought a stay of the orders made in the Authority's determination pending a decision from the Court on its challenge.

[2] The application for stay was declined on 28 May 2020.<sup>2</sup> In declining the application the Court noted that a litigant is entitled, absent good reason, to the fruits of their success.<sup>3</sup> The Court was unable to discern any good reason why Mr Higgs should be prevented from being paid in accordance with the Authority's orders.<sup>4</sup>

[3] On 25 June 2020 Mr Higgs demanded payment of the orders made by the Authority. After his demands for payment failed he lodged an application with the Authority on 30 June 2020 seeking compliance orders, penalties and interest.

[4] On 9 July 2020 Porters met the outstanding orders by making payment into Mr Higgs' bank account.

[5] On 29 July 2020 Mr Higgs lodged an amended statement of problem withdrawing his application for compliance orders and confirming his application for interest on the outstanding monies, seeking penalties for the breaches of the Authority's determination and a contribution to costs associated with this application.

[6] In its statement in reply Porters challenged the Authority's jurisdiction to determine Mr Higgs' application on the grounds that the matter was before the Employment Court by way of challenge.

[7] The parties have now lodged submissions seeking a determination of the application for penalties, interest and costs.

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<sup>1</sup> *Higgs v BR & SL Porter Limited* [2019] NZERA 655; *Higgs v BR & SL Porter Limited* [2020] NZERA 25

<sup>2</sup> *BR & SL Porter Limited v Higgs* [2020] NZEmpC 76.

<sup>3</sup> *Ibid* at [6].

<sup>4</sup> Above n 2 at [7].

[8] By the consent of the parties this matter has been determined on the papers before the Authority including the statements of problem and in reply and the submissions of the parties.

[9] As permitted by s 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 as a result. While I have not referred in this determination to all submissions received I have carefully considered all relevant material lodged with the Authority.

### **Issues**

[10] The following issues require determination:

- a) Does the Authority have jurisdiction to make the orders sought by Mr Higgs?
- b) Should a penalty be imposed on Porters for its breaches of the Authority's determinations?
- c) Should interest be awarded on the monetary awards made by the Authority?
- d) Should costs be awarded?

### **Jurisdiction**

[11] For the reasons that follow I have concluded that the Authority has jurisdiction to determine Mr Higgs' application for interest, penalties and costs.

[12] At the time Mr Higgs lodged his application a challenge was before the Employment Court with a hearing scheduled for 15 and 16 October 2020. Porters says that because the challenge was before the Court Mr Higgs should have filed his application for a compliance order in the Court, as that forum had jurisdiction over the proceedings.

[13] The Authority's jurisdiction to make a compliance order is available where a person has not observed or complied with any order or determination of the Authority.<sup>5</sup> The orders with which Mr Higgs sought compliance, were made in a determination of

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<sup>5</sup> Employment Relations Act 2000, s 137(1)(b).

the Authority. Once the Court had declined Porters' application for a stay of proceedings relating to the Authority's determination, Mr Higgs' was entitled to receive payment of the monetary orders in accordance with the determination.

[14] However, the arguments advanced by Porters in relation to the compliance orders are moot because the challenge in the Employment Court was discontinued on 9 September 2020 and Mr Higgs withdrew his application for compliance orders on 29 July 2020.

[15] Certainly while the application for stay was before the Court I agree with Porters that no compliance or other orders could be made in respect of the orders subject to the application for stay. However, once the application for stay was declined there was no barrier to the Authority dealing with Mr Higgs' application for penalties and interest.

### **Penalty**

[16] Mr Higgs seeks the imposition of a penalty on Porters for its failure to pay him the money ordered by the Authority in its determinations. Mr Higgs says Porters' failure was a breach of the Authority's determination.

[17] The Authority has jurisdiction to impose penalties where particular provisions of the Act provide for a penalty to be imposed. The Act does not provide for a penalty to be imposed for breaches of a determination. The only remedy available to Mr Higgs for Porters' breach was a compliance order.

[18] Accordingly, Mr Higgs' application for a penalty is declined.

### **Interest**

[19] I have concluded the date on which the monetary orders should have been paid to Mr Higgs was on the date the application for stay was declined. This was 28 May 2020.

[20] Mr Higgs seeks interest on the money ordered to be paid by the Authority. As stated by the Court in its decision declining the application for stay of proceedings, Mr Higgs was entitled to receive the fruits of his success. After 28 May 2020 there was no good reason why he should not be paid in accordance with the Authority's orders.<sup>6</sup>

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<sup>6</sup> Above n 2 at [6] and [7].

[21] There is no doubt Porters failed to make the ordered payments to Mr Higgs. This means Porters continued to have the use of the money rightfully belonging to Mr Higgs and in these circumstances it is appropriate to order interest be paid on the outstanding amounts for the period from 29 May to 8 July 2020 inclusive.

[22] The monetary remedies awarded to Mr Higgs included:

- a) Lost wages amounting to \$1,480.77 less PAYE equates to \$1,146.15;
- b) Compensation for hurt and humiliation of \$10,000; and
- c) Costs of \$5,000.

[23] Interest calculated on the sum of \$16,146.15 (after deductions for PAYE on the lost wages) using the Civil Debt Interest Calculator provided by the Ministry of Justice under s 13 of the Interest on Money Claims Act 2016 amounts to \$46.54.

[24] BR & SL Porter Limited is ordered to pay to Mr Higgs the sum of \$46.54 within 14 days of the date of this determination.

### **Costs**

[25] Mr Higgs seeks costs on his application. The discretion to award costs, while broad, is to be exercised in a principled way. The primary principle is that costs follow the event. The Authority has the power to order any party to pay to any other party such costs and expenses as the Authority thinks' reasonable.<sup>7</sup> The principles applying to costs are well settled and do not require repeating.<sup>8</sup>

[26] An assessment of costs in the Authority will normally start with the notional daily tariff which is \$4,500 for the first day of an investigation meeting and \$3,500 for each subsequent day.<sup>9</sup> This matter was dealt with on the papers although the parties did attend a case management call and lodged submissions.

[27] Mr Higgs seeks a contribution of costs of \$750 plus disbursements of \$71.56 being the filing fee.

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<sup>7</sup> Employment Relations Act 2000, Schedule 2, clause 15.

<sup>8</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106] – [108].

<sup>9</sup> Practice Note 2, Costs in the Employment Relations Authority.

[28] I am satisfied costs should follow the event and that the claim for costs is reasonable. Mr Higgs was put to the cost of lodging his application. Accordingly, BR & SL Porter Limited is ordered to pay costs of \$821.56 within 14 days of the date of this determination.

Vicki Campbell  
Member of the Employment Relations Authority