

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI  
ŌTAUTAHI ROHE**

[2020] NZERA 540  
3125755

BETWEEN            NICOLA JANE McKAY  
                                 Applicant

AND                    WANAKA PHARMACY  
                                 LIMITED and  
                                 WANAKA SUN (2003)  
                                 LIMITED  
                                 Respondents

Member of Authority:    Helen Doyle

Representatives:        Rob Towner, counsel for the Applicant  
                                 Kieran Tohill and Jacinta Grant counsel for the  
                                 Respondent

Investigation:            On the papers

Submissions and further    From applicant 7 December 2020  
information                No submission from respondent  
                                 Affidavit of Nicola McKay sworn on 4 December 2020  
                                 Affidavit of Aaron Heath sworn 3 November 2020 in  
                                 support of a stay of proceedings in the Employment  
                                 Court.

Date of Determination:    23 December 2020

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**DETERMINATION OF THE AUTHORITY**

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**A I order that Wanaka Pharmacy Limited and Wanaka Sun (2003) Limited comply with the determination of the Authority dated 16 June 2020 and the order in paragraph 110 (b) and pay to Nicola McKay the sum of \$57,334.24 being holiday pay by 3 February 2021.**

**B I order Wanaka Pharmacy Limited and Wanaka Sun (2003) Limited pay to Nicola McKay the sum of \$1,325 being costs and \$71.56 being reimbursement of the filing fee.**

### **Employment Relationship Problem**

[1] Nicola McKay applies to the Authority for a compliance order and costs on the basis that the respondents have not complied with a determination of the Authority to pay the applicant holiday pay of \$57,334.24.<sup>1</sup> She seeks an order that the respondents within 14 days comply with the determination to pay her holiday pay of \$57,334.24 and costs on an indemnity basis.

[2] Ms McKay was married to, but is now separated from the sole director and shareholder of the respondents, Aaron Heath.

[3] The respondents have challenged the holiday pay order made in the determination in the Employment Court.

[4] A minute from the Employment Court dated 16 October 2020 was attached to the statement of problem. It provided amongst other matters that the parties would confer and the plaintiff (the respondents) would file and serve either an application for a stay of execution or appropriate memorandum by close of business 23 October 2020.

[5] Mr Towner in an email dated 23 October 2020 to Ms Grant advised amongst other matters that Ms McKay would agree to a stay of proceedings on the basis that there was payment of \$57,334.24 into Court.<sup>2</sup>

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<sup>1</sup> *McKay v Wanaka Pharmacy Limited and Wanaka Sun (2003) Limited* [2020] NZERA 230.

<sup>2</sup> Email 23 October 2020 from Mr Towner attached to the statement of problem.

[6] On 23 October 2020 the respondents made a payment to Ms McKay of \$13,724.83 for compensation and fuel costs ordered in the determination that was not the subject of the challenge.

[7] In a minute dated 3 November 2020, the Employment Court noted that no documents had been filed in accordance with the timetable in the earlier minute of 23 October 2020. It was confirmed in the minute that Ms McKay (the defendant) is entitled to take steps to enforce the determination if she wished to do so.

[8] The Authority held a telephone conference with Mr Towner, Mr Tohill and Ms Grant on 25 November 2020 and there was agreement to directions for the lodging of a statement in reply, affidavit evidence and submissions from both parties. It was agreed the Authority would determine the matter on the papers.

[9] The Authority received a statement in reply on behalf of the respondents lodged in accordance with the agreed timetable. It provided that the respondents intended to amend the pleadings in the Employment Court and that the first ground of appeal is not strong in respect of the limitation of holiday pay to six years. The second ground of appeal is to be amended, however the nature of the amendment is not clear. The respondents will then be applying for a stay on the basis of the amended grounds. The respondents ask that any order for compliance is not made pending determination of the appeal on amended grounds.

[10] A copy of the affidavit of Aaron Heath sworn on 3 November 2020 in support of the application for a stay of proceedings in the Employment Court was attached to the statement in reply. It refers to the financial position of the respondents as challenging and attaches company accounts from both respondent companies from April 2020. The respondents say that they are not in a position to meet an award of the amount claimed and any payment into Court would be on the basis of about \$5,000 per month.

[11] The Authority received Ms McKay's affidavit and submissions.

[12] The respondent did not provide submissions in accordance with the timetable set.

### **The Issues**

[13] The Authority needs to determine the following issues in this case:

- (a) Should a compliance order be made for payment of holiday pay awarded in the Authority determination?
- (b) If a compliance order is made, then within what timeframe should the Authority specify that it is to be obeyed?
- (c) If there is an order made for compliance, then is this an appropriate case for indemnity costs.
- (d) If it is not, what costs should be awarded?

**Should a compliance order be made for payment of the holiday pay?**

[14] The Authority has the power to order compliance under s 137(1)(b) of the Employment Relations Act 2000 (the Act) where any a person has not observed or complied with any determination made by the Authority.

[15] The use of the word “may” in s 137 (2) of the Act confirms that the Authority has a discretion in ordering compliance.

[16] In this case there are some factors that support making a compliance order.

[17] Holiday pay is a statutory entitlement. Even if there are issues about the ability to pay, the Authority should proceed very cautiously in those circumstances where there has been non-compliance with an Authority determination ordering payment of a statutory entitlement. Ms McKay deposes to badly needing the money in her affidavit.

[18] There were other options available to the respondents by way of application to the Court for a stay or agreement to make payment of the amount challenged into Court. The respondents say that they now intend to make an application for a stay, but the challenge was filed in July 2020 and no such application has been made. There has been no payment into Court of the holiday pay amount pending the challenge being decided, although Ms McKay would have been agreeable to that. It is also evident from attachments to the statement of problem the level of responsiveness to emails and telephone calls from Mr Towner has not been ideal up to the point of lodging the statement of problem.

[19] I place weight on Mr Towner’s submission that the statement of claim lodged in the Court supports on its face there is some holiday pay owing. There has been no payment of

the sum referred to as owing to Ms McKay with any balance paid into Court. It is unclear what any amendment would provide in that respect.

[20] In all the circumstances I am not persuaded to exercise my discretion against making a compliance order.

[21] Ms McKay is entitled to an order for compliance that she be paid holiday pay as ordered in the Authority's determination.

**If a compliance order is made then within what timeframe should the Authority specify that it is to be obeyed?**

[22] Considering the Christmas period and any timeframes that fall thereunder, it is appropriate to order compliance by Wednesday 3 February 2021.

### **Order made**

[23] I order that Wanaka Pharmacy Limited and Wanaka Sun (2003) Limited comply with the determination of the Authority dated 16 June 2020 and the order in paragraph 110 (b) and pay to Nicola McKay the sum of \$57,334.24 being holiday pay by 3 February 2021.

### **Costs**

[24] Mr Towner has asked that costs be determined and not reserved. There has been no submission in response from the respondents about costs although agreed and timetabled. I conclude it is appropriate to determine costs at this time. To not do so would only add to costs already incurred.

### *Applicant's submissions*

[25] Mr Towner submits that Ms McKay had to take legal advice in light of what he described as "continuing defiance" of the Authority's determination. Steps taken were set out as lodging the statement of problem, considering documents lodged by the respondent, attending an urgent telephone conference with the Authority, and preparing an affidavit and submissions.

[26] Mr Towner submits that none of these steps would have been necessary if there had been compliance by the respondents, payment into Court or a stay application made in a timely manner.

[27] Costs of \$3,000 are sought.

*Analysis and conclusion*

[28] This is not a situation where it is appropriate to award indemnity costs because the circumstances do not reach that high threshold.

[29] I intend to assess costs on the basis of the daily tariff adjusted to reflect the nature of the application and time requirements. I accept that Ms McKay was put to unnecessary cost that she should not have been put to. That can be taken into account and may justify some increase to tariff.

[30] I conclude an appropriate starting point taking into account work required is a quarter of the daily tariff in the Authority of \$4,500. That is the sum of \$1,125. I increase that sum by \$200 to reflect that if the respondents had taken steps earlier then such an application would have been unnecessary. In doing so, I am mindful that cost awards in the Authority are modest. Ms McKay is also entitled to reimbursement of her filing fee of \$71.56.

[31] I order Wanaka Pharmacy Limited and Wanaka Sun (2003) Limited to pay to Nicola McKay the sum of \$1,325 being costs and \$71.56 being reimbursement of the filing fee.

**Helen Doyle**  
**Member of the Employment Relations Authority**