

**This determination includes
an order at paragraph [12]
prohibiting publication of
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2022] NZERA 170
3157321

BETWEEN	DFN Applicant
AND	BTL GROUP LIMITED First Respondent
AND	ROBERT FARAM Second Respondent
AND	KENNETH MORRISON Third Respondent

Member of Authority: Robin Arthur

Representatives: Amy De-La Cruz, advocate for the Applicant
Robert Faram for First Respondent and in person as
Second Respondent, Kenneth Morrison in person as
Third Respondent

Investigation Meeting: 26 April 2022

Determination: 2 May 2022

DETERMINATION OF THE AUTHORITY

- A. By order made under s 137(1)(b) of the Employment Relations Act (the Act) BTL Group Limited (BTL) must, within 28 days of the date of this determination, comply with orders made in two earlier determinations of the Authority by paying the following sums to DFN:**
- (i) \$14,880 for lost wages;**

[3] In an application to the Authority DFN sought compliance orders against the company, BTL director Robert Faram and a former BTL director Kenneth Morrison. She also sought interest on the sums due to her and a penalty against BTL for not complying with the Authority's earlier orders, a prohibition on publication of her name in relation to these proceedings, costs and reimbursement of the filing fee.

[4] In reply, on behalf of BTL and himself as second respondent, Mr Faram wrote that BTL was "refusing to pay [the] full amount on the principle that a gross miscarriage of justice took place against a model employer with a clean employment record of 31 years standing until falsely vilified". He said BTL was "unable to fund" the amounts ordered and the Authority should "instruct the parties to re-negotiate an acceptable settlement that [BTL] can actually pay". He also said DFN had no right to pursue him or Mr Morrison over the amounts BTL was ordered to pay, Mr Morrison had no personal interest in the business and all three respondents preferred "full publication of the case [as] there is nothing to hide from our collective points of view".

[5] Mr Morrison, in reply on his own behalf as third respondent, said he did not have and never had any shareholding or financial interest in BTL. He was appointed as a director in 2015 but ceased to act as a director from 1 April 2021. (The change was not registered with the Companies Office until 26 July 2021). He had acted as BTL's representative at the Authority's investigation meeting about DFN's personal grievance on 24 March 2021. He had also sent the message on BTL's behalf in June 2021 which asked DFN to settle for a lesser amount than awarded by the Authority. He described being named as a respondent in the compliance proceedings as "purely vindictive" and said there was no reason for him to be financially involved in the matter.

The Authority's investigation

[6] DFN, Mr Faram and Mr Morrison each lodged written witness statements for the Authority's investigation. They attended the investigation meeting to answer questions, under affirmation, about those statements. DFN attended by an audio-visual link from an overseas location where she was currently working. Mr Faram and Mr Morrison attended in person. DFN's representative, Mr Faram and Mr Morrison also each had an opportunity to make submissions about the issues for determination.

[7] As permitted by s 174E of the Employment Relations Act 2000 (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. It has not recorded all evidence and submissions received.

Issues for determination

[8] The following issues required determination:

- (i) Should any orders be made prohibiting publication of the names of any parties or other information?
- (ii) Could a penalty be imposed on BTL for not paying the awards due under the Authority's determinations by the ordered dates?
- (iii) Should a compliance order be made against BTL?
- (iv) Should interest be awarded on the amounts due?
- (v) Did the financial position of BTL require any compliance order about the money due to DFN to allow for those payments to be made by instalments?
- (vi) Should any order be made requiring any specific action by Mr Faram to prevent further non-compliance by BTL with the Authority's earlier determinations and orders?
- (vii) Should any order be made requiring any specific action by Mr Morrison to prevent further non-compliance by BTL with the Authority's earlier determinations and orders?
- (viii) Should any party be ordered to pay costs to any other party?

Prohibition on publication of DFN's name

[9] The Authority's determination of 7 May 2021 prohibited publication of the parties' names and anonymised the names of the five people who gave evidence, including DFN and Mr Faram. DFN was referred to as CC in that determination and the subsequent costs determination. BTL was referred to as RQ Limited and Mr Faram's name was anonymised with the initials SG.

[10] The reason given in the 7 May determination for not publishing the parties' names was that CC (or here DFN) was seeking alternative employment and the proceedings did not involve contested disciplinary or performance issues.

[11] Considering a request for prohibition of names or other information in Authority proceedings requires an assessment balancing the fundamental principle of open justice and whether, in the particular circumstances of the case, the party seeking such an order

has shown specific adverse consequences will likely follow unless some limit is set on the publication of names, identifying details or other aspects of the evidence.³

[12] DFN sought continued non-publication of her name. She said she was now self-employed, with her own clients and some agency work. She was apprehensive that there could be a media story about her case and, if it used her name, she might lose clients or miss out on jobs she applied for in the future. While that may ordinarily not be enough to warrant overriding the fundamental principle of open justice, the Authority member who investigated her grievance, and heard more extensively from her and others, had concluded such an order was appropriate. Accordingly, for the purposes of this determination on a compliance matter, the earlier order prohibiting publication of the applicant's name remains in effect (adopting the Authority's standard three-letter format for anonymisation). Publication of DFN's name is prohibited by order under clause 10 of Schedule 2 of the Act.

[13] However, it was neither necessary nor appropriate for names of the respondent company and its director to be prohibited from publication in a determination on a compliance matter. BTL and Mr Faram accepted the determination would be on the public record, without anonymisation of their names. Doing so did not defeat the purpose of prohibiting publication of DFN's name. It was also appropriate that a matter about an employer's failure to comply with orders made by the Authority to remedy a personal grievance was a matter of public record, not secrecy.

No penalty is available

[14] DFN sought a penalty against all three respondents "for failure to comply with the Authority's determinations". No such penalty is available on that grounds in the Authority. Section 133 of the Act allows the Authority to impose penalties for breaches of employment agreements and for a breach of any provision of the Act "for which a penalty in the Authority is provided in the particular provision". The Act has no particular provision making a person who breaches an order made in an Authority determination liable to a penalty unlike, say, the provision made in s 149(4) for a penalty against a person who breaches an agreed term of settlement. Rather, the Act provides two paths for failures to comply with orders made in Authority determinations – either by filing the order in the District Court for enforcement or, as DFN has done

³ *Erceg v Erceg* [2016] NZSC 135 at [2]-[3] and [13].

here, by seeking a compliance order in the Authority.⁴ A person who subsequently breaches a compliance order made by the Authority may be subject to further orders in the Employment Court, if sought and granted, for sequestration of property, imprisonment or a fine of up to \$40,000.⁵

BTL must comply with the Authority's determinations

[15] An order requiring BTL to comply with the Authority's earlier determinations was appropriate and necessary. BTL acted unlawfully in refusing to pay the ordered amounts by the ordered dates because Mr Faram did not agree with the outcome.

[16] The company had not pursued its rights to challenge those determinations by seeking a hearing in the Employment Court. While Mr Faram said this was because doing so was too expensive, his statement in reply disclosed another reason. He wrote that BTL had sought a legal opinion about the Authority's 7 May determination. He said the opinion "confirmed there was nothing to be gained from appealing the decision" as what Mr Faram described as the "technicalities" that led to the Authority's determination "would simply be restated as the basis to reject an appeal hence zero chance of a successful appeal".

BTL must pay interest on the sums due until they are paid

[17] DFN has been deprived of money she was entitled to have the use of from 4 June 2021 for the amounts of \$14,880 as lost wages and \$18,000 for distress compensation awarded in the 7 May determination.

[18] The 18 June 2021 costs determination did not set a specific time by which the \$7,000 awarded should be paid. A reasonable time has to be allowed. I take that reasonable period to also be 28 days as this is the length of time typically set in Authority costs determinations. Accordingly, DFN has been deprived of the use of that amount of \$7,000 since 16 July 2021.

[19] In the circumstances of long delay, and with not even some part payment made during that long delay, an order for interest on the overdue amounts was fit.⁶

⁴ Employment Relations Act 2000, s 141(1) and s 137(1)(b).

⁵ Employment Relations Act 2000, s 140(6).

⁶ Employment Relations Act 2000, Schedule 2, clause 11(1).

BTL's financial position does not require payment by instalments

[20] BTL submitted it was not able to provide the funds necessary to make the payments due to DFN. Instead Mr Faram proposed that, if any compliance order was made, the Authority should order BTL to pay \$10,000 with the remainder of the sums due to be paid in monthly instalments of \$500. The instalment plan he proposed would have to run over 60 months, that is five years, to complete payment in full of the amounts due.

[21] When the Authority is considering making a compliance order, s138(4A) of the Act allows the Authority to order an employer to make payment by instalments where the order relates to payment to an employee of a sum of money. The power to order instalments includes an express limitation on its use. The section says the Authority may order payment by instalments “only if the financial position of the employer requires it”.

[22] The use of the word “requires” indicates there must be reliable evidence about the necessity to make such an order for payment by instalments.

[23] Mr Faram said ten people, including himself, were now working for the business operated by BTL. It is an independent market agency he founded 31 years ago. It operates from central Auckland offices. Mr Faram said the business had experienced difficult times in recent years due to the disruption caused by the Covid-19 pandemic. Mr Faram and his wife, who are BTL's shareholders along with a family trust, had placed a significant amount of additional capital in the business in recent years using funds they had saved for retirement.

[24] He confirmed the business was currently trading and said it was trading solvently. As apparent from its website BTL continues to have customers seeking its services, including some substantial and well-known companies and brands. Mr Faram said BTL had no loans apart from Covid-related support loans which were being repaid to the government. While he agreed the company was not laden with debt, Mr Faram said it was also not laden with assets. Its primary asset was what Mr Faram described as its “IP” in marketing activities.

[25] Mr Faram was prepared to provide the Authority with BTL's company accounts for the last seven years but only on the basis that neither DFN nor her representative

saw them. While the Authority often protects company financial information provided in proceedings of this type by making orders prohibiting its publication or any other use, it also generally must provide the other party with an opportunity to review and comment on whatever information is provided. Where there is some genuine concern or real risk of misuse in disclosing that information to the other party, orders can be made to restrict its disclosure to a 'representative-only' basis.

[26] As Mr Faram opposed providing the accounts if DFN's representative saw them, I declined to review those documents and consider their contents in relation to whether BTL's financial position required an order for payment by instalments. Instead I accepted and have considered Mr Faram's affirmed evidence, given in his witness statement and oral evidence, about BTL's profit and loss situation over the last seven years and the current business environment for the company.

[27] While its overall results have been mixed over those years, the last two years have seen BTL record modest profits in its accounts while Mr Faram described this year's result (yet to be finalised) as "not looking great".

[28] Assessing all that information there was not sufficient to say BTL's financial position required any compliance order to provide for payment by instalments to DFN of the amounts due to her.

[29] One option for this payment is for BTL to arrange a loan, pay her in full and repay its loan from future earnings over whatever period was necessary. Mr Faram said he did not want to do that because BTL would incur interest costs. His proposal, for an instalment plan to pay DFN over five years, would effectively make her BTL's involuntary bank for what Mr Faram wanted to be an interest-free loan for BTL's debt to her. It was neither an appropriate nor, on the evidence, required outcome.

[30] BTL's request for any compliance order to allow for payment by instalments is declined.

Mr Faram must take steps necessary for BTL to comply with orders

[31] DFN's application to the Authority asked for an order requiring both Mr Faram and Mr Morrison to "be responsible for ensuring the company is put in funds to make the required payment to [her]".

[32] Such an order could be made using the power provided to the Authority by s 137(2) of the Act:

(2) Where this section applies, the Authority may, in addition to any other power it may exercise, by order require, in or in conjunction with any matter before the Authority under this Act to which that person is a party or in respect of which that person is a witness, that person to do any specified thing or to cease any specified activity, for the purpose of preventing further non-observance of or non-compliance with that provision, order, determination, direction, or requirement.

[33] The reference to ‘persons’ in this context means both human individuals and legal entities such as registered companies.

[34] This power has been used in a number of cases in the Authority and the Employment Court to order directors of a company to arrange funds necessary for the company to pay remedies ordered by the Authority.⁷ It requires an analysis of who is responsible for carrying out the acts necessary for the employing entity to pay the remedies it has been ordered to pay. A court decision, reviewing cases about such orders, described the process in this way:⁸

In each of those cases third persons were bound by compliance orders, not to make payment of a respondent’s debt 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 the liability fell.

[35] In the present matter Mr Faram’s own evidence established or confirmed the following relevant facts. Mr Faram is the managing director and founding partner of BTL. He is currently its sole director. In correspondence to the Authority about the statement of reply he had lodged for BTL and himself he said “in effect, I am the company”. He is the person with the authority in BTL to decide what payments are made and to take the steps necessary to make payments. In recent years he had taken the steps necessary to secure additional capital for BTL (from his personal funds) and, from the government, loans needed to continue to carry out BTL’s business activities.

⁷ *Allen Chambers Limited & Chambers v Pelabon* [2019] NZEmpC 45; *Cousens v Star Nelson Holdings Limited v Biggs* [2022] NZERA; *Dickson v Starting in Fencourt Limited v Rangihuna* [2021] NZERA 405; *Bye & Bye v Keelee Developments Limited & Pugh* [2019] NZERA 532 and *Pelabon v Zumo Retail Nelson Limited* [2018] NZERA Wellington 44 and [2017] NZERA Wellington 101.

⁸ *Northern Clerical Workers Union v Lawrence Publishers Co of New Zealand Limited and John Tony Holdings Limited* (1990) ERNZ Sel Cas 667 at 672, [1990] 1 NZILR 717 at 722 followed in *Chambers*, above n 7, at [37].

[36] His own evidence also established that the primary reason that the remedies had not been paid to DFN was because Mr Faram did not agree with the Authority's determinations and DFN would not agree settling with BTL for a smaller amount than she was awarded.

[37] Mr Faram's ability to direct such payments was confirmed in the description he gave in his witness statement that, if DFN agreed to his proposal for time payments over five years he would "authorise [BTL] to make an immediate upfront payment of \$10,000 and set up an automatic monthly payment direct to [DFN] for the amount of \$500 until such time as the debt is paid in full".

[38] Mr Faram may be made subject to a compliance order under s 137(2) of the Act because, in the words of the section, he is a person who is both a party and a witness in the matter before the Authority for resolution.

[39] In light of his evidence and the failure of BTL to establish its financial position required instalments, it was appropriate to exercise the powers provided by s 137(2) of the Act to require Mr Faram to arrange and use the funds necessary to pay the remedies ordered so as to prevent further non-compliance by BTL with the Authority's determinations.

No orders made requiring any action by Mr Morrison

[40] Mr Morrison considered it was unreasonable for DFN's compliance application to name him as a respondent and to seek an order holding him, along with Mr Faram, responsible for ensuring BTL was put in funds to make the payments due to her.

[41] He said he had only accepted a role as a director with BTL because of his friendship with Mr Faram. Mr Morrison said he acted as a business mentor to him. He had no financial investment in the company and got no significant reward for his role as director. He said his involvement in the Authority's earlier investigation process about DFN's personal grievance was only as an advocate.

[42] The limitation of Mr Morrison's role, as he described it, would not necessarily be apparent to an external observer during that investigation or afterwards. For example he had signed a message to DFN's representative in June 2021 as being "for and on behalf" of BTL. In that message Mr Morrison said DFN should accept an offer to settle for \$10,000 "if she wishes to receive anything at all".

[43] In that light it was understandable he was identified as a respondent. However the information on the Companies Office record and Mr Morrison's own evidence clearly established he was not a person with the level of control or influence over BTL's affairs sufficient to warrant being subject to an order under s 137(2) of the Act.

[44] The claim for such an order against him is dismissed.

BTL must pay further costs

[45] DFN sought an order for further costs of representation incurred in having to bring an application for compliance orders to the Authority. She sought costs close to the Authority's tariff of \$4,500 for a full-day investigation meeting, along with expenses of \$500 paid to have documents served on Mr Faram and Mr Morrison and reimbursement of the lodgement fee.

[46] The investigation meeting took half a day so the starting point for assessing costs on the basis of the usual daily tariff was \$2,250. By agreement the parties disclosed at the investigation meeting that DFN had made a settlement offer a few weeks earlier to settle on a basis that was very close to the orders made in this determination, including costs at half the daily tariff, and with all payments completed by 2 May. BTL did not accept that offer. If BTL had done, all parties would have been saved the time and expense of attending the investigation meeting. Accordingly a small uplift in the tariff to \$3,000 was appropriate.

[47] However a downward adjustment was also appropriate for two elements of the claim which were unnecessary or did not succeed. Firstly, the claim for a penalty was misconceived and advanced at the investigation meeting despite an indication in directions from the Authority three weeks earlier that such a remedy was not available. Secondly, it was also clear well before the investigation meeting that the claim against Mr Morrison could not succeed. Accordingly the tariff amount is reduced to \$2,400.

[48] No separate costs award is made in respect of Mr Morrison as he confirmed at the investigation meeting that he had incurred no legal costs in responding to the application.

[49] DFN is entitled to an award for the expenses of serving documents and paying the Authority's fee to lodge her application.

Parties advised of concern about threat made in the evidence

[50] There was one further element of the evidence which was of concern and discussed with the parties during the investigation meeting as some of Mr Faram's evidence appeared to include an inappropriate threat to DFN in relation to these proceedings.

[51] In his written witness statement Mr Faram said he was aware of some comments DFN had made about other people while she was working for BTL. He said she would not want those comments repeated to or shared with family, friends or current employers. Mr Faram was deliberately vague about the content of those comments and did not elaborate on them at the investigation but had written that he hoped he had "shared enough to spark [DFN]'s memory".

[52] Mr Faram wrote that he would release that information in the form of affidavits to "interested parties" but would destroy any such information he held "if we all agree to let the water go under the bridge and move on". He wrote that refuting such allegations, if distributed by him, would "foist plenty" of "further distress and suffering" on DFN and her husband.

[53] In her oral evidence at the investigation meeting DFN said she did not know what Mr Faram was talking about. She said she did not know why he would raise the topic almost two years after her employment with BTL had ended. She was concerned what he said would amount to defamation.

[54] Mr Faram, when questioned at the investigation meeting, reluctantly conceded that what he had written was "an indirect threat" that he "could make life potentially difficult" for DFN.

[55] This determination need only note that threats of that kind are not appropriate. Mr Faram himself had written in his witness statement that whatever information he was referring to was "totally unrelated to this case". I record that I have drawn the parties' attention to s 121 of the Act which states the limits to the privilege applying to statements or information given in the course of raising a grievance or in the course of any matter relating to the grievance.

Summary and orders

[56] For the reasons given, DFN has succeeded in her application for compliance orders. BTL must pay the amounts due to her in the earlier determinations of the Authority and pay interest on those amounts. Mr Faram must now take the steps necessary to ensure BTL arranges the funds necessary to pay those amounts within the timeframe set by the compliance order. BTL must also pay DFN for further costs, expenses and reimbursement of the Authority's fee for lodging her application.

[57] The orders made are set out in paragraphs A, B and C at the head of this determination.

[58] The payment of interest ordered must be made on the following basis:

- (i) For the period from 4 June 2021 until the ordered sums of \$14,880 lost wages and \$18,000 distress compensation are paid in full, BTL must pay interest on those amounts. The interest must be calculated by use of the Civil Debt Interest Calculator which applies the relevant interest rates set under the Interest on Money Claims Act 2016.⁹
- (ii) For the period from 16 July 2021 until the ordered sum of \$7,000 costs is paid in full, BTL must also pay interest on that amount, using the Civil Debt Interest Calculator to calculate the interest due.

Robin Arthur
Member of the Employment Relations Authority

⁹ www.justice.govt.nz/fines/civil-debt-interest-calculator.