

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA
TAIMAHI ŌTAUTAHI ROHE**

[2022] NZERA 246
3142505

BETWEEN JANE WYLES
Applicant

AND KAYLEE INVESTMENTS
LIMITED
First Respondent

AND MARK COWAN
Second Respondent

Member of Authority: Antoinette Baker

Representatives: Paul Matthews, advocate for the Applicant
Mark Cowan, for the first respondent
Penny Shaw, counsel for the second respondent

Investigation Meeting: 08 June 2022 at Christchurch

Submissions received: 11 April 2022, 08 June 2022 from Applicant
08 June 2022 from Second Respondent

Determination: 14 June 2022

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] On 12 May 2021 the Authority determined that the applicant (Ms Wyles) had been unjustifiably dismissed by way of constructive dismissal as well as disadvantaged in her employment. The Authority ordered her employer, the first respondent (Kaylee) to pay her \$ 22,591.86 (the orders) being:

- (a) \$19,000.00 pursuant to s123(1)(c)(i) Employment Relations Act 2000 (the Act).

- (b) \$1,270.30 (gross) lost wages pursuant to ss 123(1)(b) and 128 of the Act.
- (c) \$2,250.00 for a contribution to legal costs.
- (d) \$71.56 for the filing fee.

[2] Kaylee has not complied with the orders.

[3] Ms Wyles seeks the following:

- (a) A compliance order under section 137(1)(b) of the Act against the first respondent together with interest on the default payment, reimbursement of the \$71.56 filing fee for this application and costs.
- (b) An order under section 137(2) of the Act that the second respondent (Mr Cowan), the sole director of Kaylee, takes all necessary steps to ensure Kaylee complies with any compliance order I might make.

The Authority's investigation

[4] For the Authority's investigation a statement of problem (later amended) and a statement in reply from Mr Cowan (later amended) were received together with affidavits from Mr Cowan and the accountant for Kaylee, Michael Laing. The Authority requested and received a copy of the sale and purchase agreement for the business owned by Kaylee (called Victoria Foods) together with a business appraisal of the same. Mr Cowan gave evidence at the investigation meeting and answered questions from me. Jane Wyles did not give evidence but was present. The representatives also gave oral submissions at the investigation meeting and answered questions from me.

[5] While Mr Cowan was personally represented, that representation did not extend to Kaylee. However, I heard from Mr Cowan and consider that as the sole director of Kaylee he was able to speak for the company as well as himself during the investigation meeting.

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

The issues

[7] The issues requiring investigation and determination were:

- (a) Should the Authority order compliance against Kaylee and if so, should interest be awarded?
- (b) If the Authority orders compliance against Kaylee, should Mark Cowan be ordered to take steps to ensure that compliance and if so, what steps?

Should the Authority order compliance against Kaylee and if so, should interest be awarded?

[8] Ms Wyle's representative has outlined the steps she has taken to have Kaylee pay the orders. I accept these steps were met with no response from Kaylee.

[9] While it is not in dispute that Kaylee has not complied with the orders, counsel for Mr Cowan submits this is a company insolvency problem rather than intention to avoid payment. I am referred to the discretionary nature of ordering compliance. I am also referred to the Employment Court¹ where it refers to declining to order compliance where the respondent is unable to pay even if the original orders were based on the 'most deserving of cases.' I am also referred to a recent Authority determination.² In that matter, a compliance order was declined because it was unlikely the respondent company was able to pay the orders made. It was observed that subsequent likely noncompliance carries serious punitive sanctions, none of which would resolve what was 'fundamentally a company solvency problem.'

[10] While Ms Wyles' representative says that I should order compliance against Kaylee because the fact of non-payment is not in dispute, and it remains registered, I am satisfied by the evidence before me that this would be a futile exercise. I find the following evidence satisfies me that Kaylee has no likely prospect of paying the orders made by the Authority on 12 May 2022:

¹ *New Zealand Clerical Workers Union v Huysers Books Limited*, NZEmpC, 17 December 1991, WEC 28/91.

² *Kevin Barrett v NRS Refrigeration Ltd* [2021] NZERA 344.

- a. Kaylee has been in financial difficulties since at least early 2020 when its main secured creditor (the bank) took steps to stop further lending and suggested as an option the sale of the catering business that Kaylee operated.³
- b. Kaylee's financial reports for the year ending 31 March 2020 show it suffered a net loss of \$374,003.
- c. The agreement for sale and purchase of the business and the appraised market value of assets and plant shows a negotiated process to arrive a sale price. There is consistency in these documents with Mr Cowan's evidence that late model motor vehicles (which appear to have had the greatest asset book values) were subject to finance agreements and those loans were assigned to the buyers of the business. Older vehicles were valued and sold with the business. One vehicle was sold separately, and Kaylee's accountant confirms the proceeds from this went towards repayments to the bank.
- d. Kaylee's accountant swears in his affidavit that:
 - i. he advised selling the business and that for Kaylee to otherwise continue trading would risk trading insolvent.
 - ii. he negotiated significant remittance of loans to the bank and the Inland Revenue Department (IRD).
 - iii. all proceeds from the sale of the business went to the bank and that the shortfall to repay the bank was over \$700,000.00.
 - iv. the IRD had noted that Kaylee had ceased trading and deregistered it for all tax types.
 - v. in his 'experience IRD do not agree to remit debts unless there is no chance of recovering the money owed'.
 - vi. because 'these creditors [the bank and IRD] agreed to write off the debts due and there being no funds available to appoint a liquidator Kaylee Investments Limited has ceased trading and no one else has petitioned to have the company liquidated, this is the only reason it remains on the Companies Register.'

³ Letter from the bank to Kaylee dated 15 April 2020, Appendix 'A' of Mark John Cowan sworn 30 September 2021.

[11] Based on the above I am satisfied that it serves no real purpose ordering compliance against Kaylee.

If the Authority orders compliance against Kaylee, should Mark Cowan be ordered to take steps to ensure that compliance and if so, what steps?

[12] I have not ordered the compliance sought and have not then considered what if any steps Mr Cowan ought to take to ensure that Kaylee complies under s 137 (2) of the Act.

[13] The representative for Ms Wyles raised a question about whether the sale of Kaylee's business was a 'sham' indicating deliberate avoidance by Kaylee or Mr Cowan to comply with the orders made on 12 May 2021. It was suggested that the business was sold to family at discount after which Mr Cowan continued to operate the business. While the claim to 'lift the corporate veil' was not further advanced, any proposal that there was deliberate avoidance by Kaylee to pay the orders is inconsistent with the above evidence. It is also inconsistent with the sale of Kaylee's business occurring in June 2020 which was over 12 months *before* the orders in favour of Ms Wyles were made. I also note that the bank exercised a right to approve the sale to mitigate its loss as a secured creditor. It is unlikely the bank would have approved a sale price that was undervalued. I have already noted that the bank ultimately incurred a loss of over \$700,000.00 after the sale of the business.

[14] While it is no doubt very difficult for Ms Wyles not to have been paid the orders after showing the Authority that she had not been treated fairly by Kaylee, the evidence satisfies me that there is no useful purpose ordering compliance. Ms Wyles obviously retains her determination together with a certificate of determination issued soon after, both of which confirm her holding of a judgment debt against Kaylee.

Summary

[15] The application for compliance with interest against Kaylee is dismissed. The application for an order against Mark John Cowan under s 137(2) of the Act is dismissed.

Costs

[16] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves given the circumstances of this matter.

[17] If the parties are unable to agree as to costs, Mr Cowan may lodge and serve a memorandum on costs within 14 days of the date this determination. Ms Wyles would have 14 days to lodge her reply. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[18] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless circumstances or factors required an upward or downward adjustment of that tariff.⁴

Antoinette Baker
Member of the Employment Relations Authority

⁴ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].