

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

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

[2024] NZERA 177
3213559

BETWEEN	KARL YOUNG Applicant
AND	ECO PILE LIMITED First Respondent
AND	GRAEME HANNAH Second Respondent

Member of Authority: Andrew Gane

Representatives: Daniel Church, counsel for the Applicant
No appearance for the First and Second Respondents
Derek Gaeth, in person

Investigation Meeting: 24 October 2023 by AVL

Submissions and further information received: 24 January 2024

Determination: 27 March 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] Karl Young seeks compliance orders with the determinations of the Authority dated 5 October 2022 and 6 January 2023 (the determinations) in which awards were made in his favour.¹ He also seeks an award of interest on the unpaid awards and costs.²

[2] Mr Young also seeks to join Graeme Hannah, Pile-Up Limited and Derek Gaeth as respondents so that compliance orders can be made against them.

¹ *Young v Eco Pile Limited* [2022] NZERA 505 and *Young v Eco Pile Limited* [2023] NZERA 3.

² Employment Relations Act 2000 s137(1)(b)

[3] Mr Gaeth opposes being joined to the proceedings and the compliance order being sought against him.

[4] Eco Pile Limited (EPL), Mr Hannah and Pile-Up did not participate in this matter.

The Authority's Investigation

[5] By consent this matter was determined by an investigation meeting held by AVL in which I heard submissions.

[6] Mr Young, Matthew Ashton, former director and shareholder of EPL and Bryan Ashton lodged affidavits dated in support of Mr Young's application. Mr Young's representative spoke to the submissions. Mr Gaeth had previously filed a statement in reply and appeared for himself and made oral submissions.

[7] As permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination does not record all the evidence and submissions received and fully considered during the Authority's investigation, but has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter, and specified orders made as a result.

Issues

[8] The issues for investigation and determination are:

- (a) Should a compliance order be made against EPL to comply with the determinations.
- (b) Should interest should be awarded on the outstanding amount.
- (c) Whether any of Mr Hannah, Mr Gaeth or Pile-Up should be joined as a respondent and whether compliance orders should be made against any of them.

Whether a compliance order should be made against EPL to comply with the determination

[9] Section 137(1)(b) of the Act empowers the Authority to order a party to comply with any determination made under the Act and provides that it may be enforced by a compliance order.

[10] EPL has failed to comply with the determinations. EPL has not provided reasons for the default and has not been released from the obligation to pay Mr Young the amounts ordered. Therefore, it is appropriate to exercise my discretion under s 137(1)(b) of the Act to order compliance with the sums outstanding.

[11] Having considered all the circumstances, I find it is just, in the circumstances, for an order to be made requiring EPL to comply with the determination. Within 14 days of the date of this determination, EPL is ordered to comply with the determinations and pay to Mr Young:

- (a) \$15,000 compensatory damages under s 123(1)(c)(i) of the Act.
- (b) \$18,480 lost wages under s 123(1)(b) of the Act.
- (c) \$1,478 in holiday pay for the lost wages.
- (d) \$4,571.56 costs award including the filing fee.

[12] I note here that imposition of a compliance order is a serious matter. Should EPL fail to comply with the compliance order I have made, Mr Young is entitled to pursue the breach in the Employment Court or the District Court. The Employment Court has powers to impose a fine not exceeding \$40,000, order property to be sequestered, or impose a sentence of imprisonment not exceeding 3 months.³ Alternatively, a certificate of determination may be obtained from the Authority and enforcement obtained in the District Court.

Should Mr Hannah be joined as respondent and a compliance order be made against him?

[13] Under s 137 of the Act, the Authority has a broad discretion to order compliance with a range of matters including determinations issued by the Authority. A compliance

³ Employment Relations Act 2000, Section 139 and 140(6).

order may be made against a person who is not an original party to the proceedings, for the purpose of ensuring earlier decisions are complied with.

[14] Under s 221(a) of the Act, the Authority may join parties to the proceedings in order to make compliance orders against them.⁴ The terms of any such compliance orders would usually be to ensure that the original party complies with the orders being enforced, not that the joined parties should themselves comply by, for example, personally paying sums of money ordered. In cases where an incorporated employer has failed to pay a sum of compensation to an employee, the Authority may order a director to use his or her position of control to ensure that the liability is met by the employer company.⁵ There may be cases where joining should be declined because it would serve no useful purpose.⁶

[15] Despite the fact that Mr Hannah has not engaged in this matter, I am satisfied that he has had a fair opportunity to provide information relevant to whether the order sought against him should be made.

[16] Mr Hannah is the sole director of EPL as well as a 45% shareholder. He is able to direct EPL to comply with the Authority's orders in the determinations.

[17] Mr Hannah has sufficient connection to and the necessary power to arrange for EPL to secure and provide the funds to meet the obligation owed to Mr Young.

[18] Mr Hannah is aware of the claim Mr Young has made against EPL and the nature of the claim. He is also aware EPL is in default of the obligation owed to Mr Hannah to pay the outstanding determination sums.

[19] This is not a situation where the corporate veil is lifted, and an order made against Mr Hannah personally to put EPL into funds to meet the obligation owed to Mr Young.

[20] Under s 221(a) of the Act Mr Hannah is joined to these proceedings.

⁴ *New Zealand Performance and Entertainment Workers Union v Infrass Holdings Ltd* (LC) Auckland ALC85/90, 26 July 1990.

⁵ *Northern Clerical IUOW v Lawrence Publishing Co of NZ Ltd* (1990) ERNZ Sel Cas 667 (LC); *Allen Chambers Ltd v Pelabon* [2019] NZEmpC 45 at [43]–[58].

⁶ at [17].

[21] Within 14 days of the date of this determination Mr Hannah is ordered under s137(2) of the Act to take the steps necessary to ensure EPL complies with the determinations.

[22] Mr Young has also sought a compliance to stop Mr Hannah from engaging in any conduct that may be intended in whole or in part to cause EPL to materially avoid or default upon its liability to Mr Young. This is really a request for *quia timet* injunction and I decline to exercise my discretion to make such an order.

Should Pile Up be joined as respondent and a compliance order be made against it?

[23] Pile-Up is a limited liability company with Mr Hannah being the sole director and shareholder.

[24] The affidavit evidence in this matter shows that the former business relationships of EPL have been taken over by Pile-Up. This is the only evidence of any connection between EPL and Pile-Up.

[25] There is no evidence that Pile-Up has any ability to control or direct EPL. In the circumstances I am not prepared to join Pile-Up to this matter and make the compliance order sought.

Should Mr Gaeth be joined as respondent and a compliance order be made against him?

[26] Mr Young has sought to have compliance orders against Mr Gaeth. Mr Gaeth is a 10% shareholder of EPL.

[27] After hearing from Mr Gaeth at the investigation meeting, I am not persuaded that joining Mr Gaeth would serve any useful purpose.

[28] I decline to join Mr Gaeth to this matter and will not make the compliance order sought.

Other orders sought by Mr Young

[29] Mr Young has also sought a direction from the Authority affirming that, in the event of further non-compliance by any of the aforementioned parties, Mr Young may apply to the Employment Court for a number of ancillary orders under s138(6) of the Act. I decline to make such a direction as Mr Young may apply directly to the Employment Court under s140 of the Act for such orders.

Interest

[30] Mr Young seeks interest on the settlement monies. The Authority has the power to award interest under clause 11 of the Second Schedule of the Act. Interest is to reimburse someone for the loss of use of monies to which there is an established entitlement. It is appropriate where a person has been deprived on the use of money to make an award for interest.

[31] EPL is ordered to calculate and pay interest within 28 days of the date of this determination on the sum of \$39,529.56.

[32] Interest is payable in accordance with Schedule 2 of the Interest on Money Claims Act 2016. A calculator to assist in the calculation of interest is available on the Ministry of Justice website. Interest is to be calculated from the date of this determination until the sum is paid in full.

Summary of orders

[33] Within 14 days of this determination EPL is ordered to pay Mr Young the following amounts owing under the determinations:⁷

- (a) \$15,000 compensatory damages under s 123(1)(c)(i) of the Act
- (b) \$18,480 lost wages under s 123(1)(b) of the Act.
- (c) \$1,478 in holiday pay for the lost wages.
- (d) \$4,571.56 for costs.

[34] Within 14 days of the date of this determination Mr Hannah is ordered to take all necessary steps in his capacity as sole director and agent of EPL to ensure EPL can make full payment to Mr Young of the outstanding determination sums.

Costs

[35] Costs are reserved. The parties are encouraged to attempt to resolve the issue of costs themselves. If this is not possible and a contribution to costs is sought, Mr Young should file and serve a costs memorandum within 14 days of the date of this

⁷ *Young v Eco Pile Limited* [2022] NZERA 505 and *Young v Eco Pile Limited* [2023] NZERA 3.

determination. EPL and Mr Hannah should file any reply memorandum within 7 days of receipt of such.

Andrew Gane
Member of the Employment Relations Authority