

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2024] NZERA 203
3270439

BETWEEN CARL SHANKS
 Applicant

AND RAY THOMAS and RUTH
 THOMAS trading as TE MATAI
 PARTNERSHIP
 Respondents

Member of Authority: Philip Cheyne

Representatives: Damien Pine, counsel for the Applicant
 Respondents in person

Submissions and
Information Received: 13 February and 19 March 2024 from the Applicant
 20 February and 5 April 2024 from the Respondents

Date of Determination: 8 April 2024

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In an earlier determination,¹ I found that Mr Shanks had a personal grievance against his former employer Mr and Mrs Thomas trading as Te Matai Partnership. To settle the personal grievance, Mr and Mrs Thomas were ordered to pay reimbursement of \$13,750.00 and compensation of \$27,500.00 to Mr Shanks.

¹ *Shanks v Thomas and anor trading as Te Matai Partnership* [2023] NZERA 585.

[2] In a second determination,² Mr and Mrs Thomas were ordered to pay Mr Shanks arrears of \$37.06 under the Minimum Wage Act 1983, arrears of \$2,679.90 under the Holidays Act 2003 and costs of \$6,821.55.

[3] By this application Mr Shanks seeks a compliance order to require Mr and Mrs Thomas to pay him these amounts, as nothing has been paid.

[4] In their statement in reply, Mr and Mrs Thomas seek approval to pay Mr Shanks over a period of twelve months. Mr and Mrs Thomas note that the total they owe including the second determination is close to \$50,000.00.

The Authority's investigation

[5] A case management conference was convened. Mr and Mrs Thomas confirmed that no payments had been made. I drew to their attention s 138(4A) of the Employment Relations Act 2000 which permits the Authority to order payment by instalments but only if the financial position of the employer requires it.

[6] Arrangements were agreed for the application to be investigated on the papers, with dates set for Mr Shanks to lodge an affidavit, Mr and Mrs Thomas to lodge affidavits and for submissions from the applicant. I left open the possibility of allowing further information or submissions from Mr and Mrs Thomas.

[7] Mr Shanks in his affidavit set out the amounts due under the determinations dated 9 October 2023 and 13 December 2023 and confirmed that nothing had been paid.

[8] Mr and Mrs Thomas forwarded a letter from a chartered accountant.

[9] Counsel for Mr Shanks lodged submissions.

[10] I considered that Mr and Mrs Thomas should have a further opportunity to lodge submissions or information in reply to counsel's submissions. I enlarged time for Mr and Mrs

² *Shanks v Thomas and anor trading as Te Matai Partnership* [2023] NZERA 743.

Thomas to respond, as it appeared that they had not received counsel's submissions and my direction. Mr and Mrs Thomas then lodged a reply to counsel's submissions.

Does the employer's financial position require payment by instalments?

[11] Where a person has not complied with an order by the Authority, s 137 of the Employment Relations Act 2000 permits the Authority by order to require the person to do any specified thing to prevent further non-compliance with the order.

[12] A person such as an employee who alleges they have been affected by the non-compliance may apply to the Authority for an order under s 137 of the Act.

[13] Mr Shanks has attempted to obtain payment of the sums due to him. Mr and Mrs Thomas have paid nothing.

[14] I find that Mr and Mrs Thomas have not complied with the orders made by the Authority in the two earlier determinations and that Mr Shanks has been affected by this non-compliance.³

[15] It follows that there are grounds for the Authority to exercise the power given to it by s 137 of the Employment Relations Act 2000.

[16] A compliance order in this case would relate to the payment of money to a former employee, so s 138(4A) of the Employment Relations Act 2000 applies. I may order payment to Mr Shanks by instalments, but only if the financial position of the employer requires it.

[17] The only evidence of the employer's financial position is a letter from a chartered accountant. Mr Johnston says he has seen the business bank statements of the "partnership" and at present every month there is only fractionally more income received than expenses paid. Mr Johnston says that "they" do not have the ability to make a lump sum payment. He supports the application for monthly instalments.

[18] Counsel for Mr Shanks submitted that Mr Johnston's letter was not sufficient evidence of the true financial position of Mr and Mr Thomas. Counsel also drew attention to *Stein v*

³ Above n 1 and n 2.

Garrard's (NZ) Limited,⁴ where the Authority considered that more than the employer's convenience or preference is required to engage s 138(4A) of the Act, even when the employer's financial position is not strong.

[19] Despite having the opportunity to provide further information or submissions, Mr and Mrs Thomas provided no additional information about their financial position.

[20] The evidence provided falls well short of objective proof to establish that the financial position of Mr and Mrs Shanks requires payment by instalments.⁵ Mr Johnston refers only to the "business bank statements" and the cash-flow situation at present to support his view that Mr and Mrs Thomas do not have the ability to make a lump sum payment. Nothing is said with respect to the financial position of Mr and Mrs Thomas aside from the "business bank statements", their ability to fund the lump sum due to Mr Shanks or to borrow to do so.

[21] I find that the financial position of Mr and Mrs Thomas does not require payment by instalments.

A compliance order is appropriate

[22] Mr Shanks could have enforced the Authority's orders in the District Court by effect of s 141 of the Employment Relations Act 2000. However, he has elected to seek a compliance order.

[23] I am satisfied that a compliance order is required to prevent further non-compliance with the Authority's orders.

[24] Ray Thomas and Ruth Thomas trading as Te Matai Partnership are to pay Carl Shanks the following amounts by no later than Tuesday 7 May 2024:

- (a) reimbursement of \$13,750.00 (gross);
- (b) compensation of \$27,500.00;

⁴ *Stein v Garrard's (NZ) Limited* ERA Auckland, AA287/08, 8 August 2008.

⁵ *Sinclair v Datum Connect Limited* [2014] NZERA Auckland 463 at [14].

(c) arrears of \$37.06 (gross) and \$2,679.90 (gross); and

(d) costs of \$6,821.55.

[25] Costs on this application and interest on the unpaid amounts were not claimed.

[26] I draw attention to s 140 of the Employment Relations Act 2000, a copy of which is attached. It sets out powers available to the Court, on Mr Shanks' application, should Mr and Mrs Thomas failure to comply with the Authority's compliance order.

Philip Cheyne
Member of the Employment Relations Authority