

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

**I TE RATONGA AHUMANA TAIMAHI
ŌTAUTAHI ROHE**

[2021] NZERA 344
3133675

BETWEEN KEVIN BARRETT
Applicant

AND NRS REFRIGERATION LIMITED
Respondent

Member of Authority: Philip Cheyne

Representatives: Paul Mathews, advocate for Applicant
Leanne Smith, advocate for Respondent

Submissions received: 19 & 31 May, 8 & 14 June 2021 from Applicant
20 & 31 May, 4 June, 11 & 18 June 2021, 2 & 21 July 2021
from Respondent

Determination: 3 August 2021

DETERMINATION OF THE EMPLOYMENT RELATIONS AUTHORITY

A. The application is dismissed.

Employment Relationship Problem

[1] In a determination dated 16 February 2021, the Authority ordered NRS Refrigeration Limited to pay Kevin Barrett a total of \$27,740.00 under s 123(1)(c)(i) and s 123(1)(b) of the Employment Relations Act 2000 (the Act).¹ On 15 April 2021, NRS Refrigeration was ordered to pay \$4,571.56 in costs.²

¹ Kevin Barrett v NRS Refrigeration Limited [2021] NZERA 56.

² Kevin Barrett v NRS Refrigeration Limited [2021] NZERA 148.

[2] On 4 March 2021, Mr Barrett lodged an application for a compliance order to require NRS Refrigeration to comply with the 16 February determination by paying \$27,740.00. Interest and penalties were also sought. In reply, NRS Refrigeration said it was not in a financial position to pay what was sought.

[3] At a case management conference, the claim for a penalty was discontinued. Not paying the amount as ordered in a determination does not render the defaulter liable for the imposition of a penalty under s 133 of the Act. Mr Barrett's advocate sought to have the application dealt with on the papers. NRS Refrigeration consented to that approach, so I set dates for submissions from each party. I have now received submissions from both parties, including further responses to issues raised by me.

[4] Under s 137 of the Act, if a person has not complied with a determination of the Authority, the Authority on application may order the person to do any specified thing for the purpose of preventing further non-compliance. Where a person fails to comply with the Authority's order under s 137 of the Act, the Employment Court on application may exercise powers under s 140(6) of the Act. The Court's powers include ordering that the person be sentenced to imprisonment for a term not exceeding three months, fining them a sum not exceeding \$40,000.00 and ordering that their property be sequestered. Imprisonment would not be at risk here because the respondent is a company. Regardless, the potential consequences of not complying with an order made by the Authority under s 137 of the Act are serious. They are punitive and akin to contempt, where there is another option for enforcement of money orders.³

[5] The potential for serious consequences for a party of not complying with a compliance order has caused the Employment Court to decline a compliance order when satisfied that compliance would be an impossibility due to a company's financial circumstances.⁴ The Court noted the futility of making an order, but also expressed concern about the potential for a contest between sequestrators appointed by it and receivers or liquidators appointed under the Companies Act 1955 (as it then was).

³ *Peter Reynolds Mechanical Ltd v Labour Inspector* [2016] NZCA 464.

⁴ *New Zealand Clerical Workers Union v Huysers Books Ltd*, Employment Court, Wellington, 17/12/1991, WEC 28/91.

[6] In the present case, NRS Refrigeration has not complied with the Authority's earlier compensation orders. Mr Mathews in submissions asked that the compliance order application be extended to cover the Authority's costs order, as it had not been complied with. I will treat the application as having been amended to that extent. No date for payment of the compensation and costs was included in the orders, so the amounts were payable immediately as at the date of the determinations. As NRS Refrigeration has not complied with these orders, the Authority has power to order payment under s 137 of the Act.

[7] Compliance is a discretionary remedy. I turn to consider whether it would bring about a resolution of the current problem.

[8] There is a statement and other indications in the material that NRS Refrigeration does not accept the outcome of the dispute between it and Mr Barrett, despite the earlier determinations. I refer to exchanges with Mr Mathews and some other material before the Authority, but it is not necessary to set this out here. If obduracy was the reason for non-compliance with the Authority's determinations, a compliance order is likely to be an effective remedy, given the serious risks the party faces if they persist with not complying. In the present matter, however, I am persuaded that NRS Refrigeration is unable at present to meet the orders made against it in Mr Barrett's favour.

[9] NRS Refrigeration has a substantial debt to IRD, significantly larger than the default in payments due to Mr Barrett. The IRD debt is in respect of several tax types. There may be issues about whether IRD is a preferential creditor in respect of some of the arrears. The 20 May 2021 IRD statement records an additional \$2,500.00 (approximately) is due for payment in June. There is evidence that NRS Refrigeration has sought and been granted an extension of its IRD obligations to 27 June 2021 with that described as its "last chance". That eventually led to an arrangement with IRD writing off a significant amount of debt, but leaving an IRD debt still much larger than is owed to Mr Barrett.

[10] NRS Refrigeration's audited accounts for March 2020 show a significant net loss for the year. The balance sheet records negative equity. Substantial non-current liabilities are shown, mostly accompanied by security interests held by the lenders over company assets. The depreciation schedule also indicates no real prospects for the debt to Mr Barrett being met from asset sales. The balance sheet shows a positive balance for the shareholders current

account as a company asset. However, that does not establish that the amount recorded is available to the company to use in satisfaction of its debt to Mr Barrett.

[11] There is evidence that NRS Refrigeration has advertised to employ a qualified refrigeration engineer. I treat this information as an indication of NRS Refrigeration's intention to try and continue to trade, despite its financial circumstances. It does not establish that the information and statements from the company about its dire financial situation lack credibility. A May 2021 statement reports reasonably large sum of current accounts as receivable. A statement of accounts payable has not been included. This indicates that continued trading might allow NRS Refrigeration to reduce in indebtedness, if allowed time to do so by creditors. It does not establish that NRS Refrigeration could probably meet its liability to Mr Barrett in the short or medium term. There is evidence of inter-company transfers from NRS Refrigeration to a related company. The amounts are small. The related company is not trading, having reported a trading loss in the year to 31 March 2020. It is now shown as overdue in its obligation to file an annual return with the Companies office, with the Registrar continuing with action to remove it from the company register. There is no reason to think that the second company has been used as a mechanism for NRS Refrigeration to avoid its obligation to Mr Barrett.

[12] In submissions Mr Mathews sought a compliance order requiring payment within 28 days, or alternatively payment at not less than \$5,000.00 per month if warranted on proof of NRS Refrigeration's financial position. Later, Mr Mathews sought an adjournment for four weeks, with NRS Refrigeration required to report back on developments following the IRD's deadline. The updated IRD position mentioned above leaves no room to think that NRS Refrigeration has capacity to meet regular payments to Mr Barrett of a figure approaching a sum that Mr Mathews has indicated would be acceptable.

[13] If a compliance order relates to the payment of money to an employee, the Authority may order payment by instalments, but only if the financial position of the employer requires it. I am satisfied that the financial position of NRS Refrigeration means it is unable to pay its debt to Mr Barrett in a lump sum. While there is scope to think that NRS Refrigeration might be able to meet a small amount regularly, it would have to be at a very low amount.

Mr Barrett appears to have rejected the possibility of a small regular payment as unacceptable earlier.

[14] To summarise, NRS Refrigeration would probably be unable to pay the debt if it was ordered to do so in a lump sum. NRS Refrigeration would probably be unable to comply with an order to pay by instalments, if instalments were set anywhere near the level that Mr Barrett has indicated would be acceptable. NRS Refrigeration would probably default if I ordered it to comply with the judgment amounts in Mr Barrett's favour. Mr Barrett would be left to seek sanctions for that non-compliance. There would be further powers available to the Court in response to that prospective non-compliance, but sanctions appear unlikely to deal with what is fundamentally a company solvency problem.

[15] Mr Barrett can rely on s 141 of the Act to access the enforcement processes available in the District Court. Other options are also available to him as a creditor of a company. Not succeeding on this application for a compliance order, does not deprive Mr Barrett of these options.

[16] For these reasons, I exercise the discretion to decline the application for a compliance order. As I have not ordered the recovery of money, I do not have power under clause 11 of Schedule 2 of the Act to order the inclusion of interest. Costs normally follow the event. Mr Barrett is not entitled to costs, given the outcome. NRS Refrigeration was not legally represented, so is not entitled to costs.

Philip Cheyne
Member of the Employment Relations Authority