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Fuimaono v Houia [2017] NZEmpC 83 (5 July 2017)

Last Updated: 10 July 2017

IN THE EMPLOYMENT COURT WELLINGTON

[\[2017\] NZEmpC 83](#)

EMPC 283/2016

IN THE MATTER OF a challenge to a determination of the

Employment Relations Authority

AND IN THE MATTER of an application for an order that money be paid by instalments

BETWEEN HEATHER FUIMAONO First Plaintiff

AND MAHIA FUIMAONO Second Plaintiff

AND LEEANNE HOUIA Defendant

Hearing: (on the papers filed on 1, 2, 13, 20 and 27 June 2017) Appearances: F Handy, counsel for the plaintiffs

A Knowsley, counsel for the defendant

Judgment: 5 July 2017

JUDGMENT (NO 2) OF JUDGE B A CORKILL

Introduction

[1] In the Court's substantive judgment, it was confirmed that Leeanne Houia had been employed by Heather Fuimaono and Mahia Fuimaono rather than by a company known as Kare-Fui Ltd (KFL).¹ Accordingly, they are jointly and severally liable for the monies which the Employment Relations Authority (the Authority) previously ordered them to pay Ms Houia, totalling \$39,862.02.² The sum is made

up as follows:

¹ *Fuimaono v Houia* [\[2017\] NZEmpC 63](#).

² *Houia v Nga Taonga Tuku Iho I Te Wa Kainga (NTTI)* [2016] NZERA Wellington 126 at [39].

(i) \$11,250 gross as recompense for wages lost as a result of the established unjustified dismissal;

(ii) \$7,500 gross as compensation for humiliation, loss of dignity and injury to feelings;

(iii) \$18,726.82 gross being unpaid wages and holiday pay; and

(iv) \$2,385.20 gross being reimbursement of expenses payable pursuant to

Ms Houia's employment agreement.

[2] Heather Fuimaono and Mahia Fuimaono have each now filed an application under [s 131\(1A\)](#) of the [Employment Relations Act 2000](#) (the Act) for an order that the amount due to Ms Houia be paid by instalments.

[3] That provision directs that the Authority may order payment of wages or other money to an employee by instalments, but only if the financial position of the employer requires it.

[4] The Authority recorded there was no supporting evidence for such an order. Since there was also insufficient evidence to consider such an application in this Court, I reserved leave for the making of appropriate applications, which duly occurred.³ The applications are strongly opposed by Ms Houia.

[5] I observe that three of the four payments for which Heather Fuimaono and Mahia Fuimaono are liable were made under [s 123](#) of the Act. That section also provides for the payment of financial remedies to an employee by instalments if the financial position of the employer requires it.⁴ Although neither counsel referred expressly to that sub-section, both parties proceeded on the basis that the Court does have jurisdiction to order instalments in respect of financial remedies as well as for unpaid wages and holiday pay. I therefore approach the matters before me on the basis that there is no issue as to jurisdiction; the only question is whether this Court

should in fact make orders that payments be made by instalments.

³ *Fuimaono v Houia*, above n 1, at [66].

⁴ [Section 123\(2\)](#).

The evidence

[6] Each applicant has provided an affidavit describing her financial circumstances.

[7] Heather Fuimaono is in receipt of a salary of \$72,210. She owns a property which, on the basis of the improved value assigned to it by Porirua City Council and having regard to the mortgage secured over the property, has modest equity. She also has other substantial liabilities. These appear to include reimbursement of monies paid to KFL by the Ministry of Education. The repayments are being made because the company no longer trades. It is unclear whether Heather Fuimaono is

required to make payments on behalf of KFL, but she is reducing the overpayment.⁵

She has also produced a statement of income and expenses, which verifies some discretionary spending. She says that she is unable to make any “substantial contribution at this time” to the amounts for which she has been found liable.

[8] Mahia Fuimaono is currently in receipt of a job-seekers benefit of \$255.13 per week. She has modest assets and significant debt. She also says that she cannot make any “substantial contribution at this time” to repay the amounts for which she is liable.

[9] In his supporting submissions, Mr Handy, counsel for the applicants, helpfully analysed the financial information which has been provided. Included in those submissions was advice that both applicants had been granted legal aid for the substantive proceeding. He also submitted that only Heather Fuimaono was in a position to make any payment towards the debt, and submitted that with an adjustment to her lifestyle and budget, she could pay \$100 per month in reduction of the amount which is owed.

[10] Ms Houia’s counsel, Mr Knowsley, also helpfully analysed the financial information which has been provided. He submits that Heather Fuimaono in fact has the ability to meet the liability which she has been ordered to pay; he highlights

potential equity in real estate, and submitted that a KiwiSaver asset could also be

⁵ *Fuimaono v Houia*, above n 1, at [17].

utilised. With regard to Mahia Fuimaono, he submitted that she owns a motor vehicle, which he says could be sold to assist in discharging the debt. Although the value of the vehicle was unknown, it was assumed there would be funds available following seizure and sale of that vehicle. Mr Handy in reply, however, submitted that the vehicle was worth substantially less than the extent of debt secured over it.

Legal framework

[11] The two sub-sections which I mentioned earlier, together with a third,⁶ were introduced by the provisions of the Employment Relations Amendment Act (No 2)

2004. Extrinsic materials do not obviously elaborate on Parliamentary intent.

[12] These provisions allow only for the possibility of ordering payment by way of instalments; they do not authorise the Court to order liquidation of assets.

[13] For the purposes of this case, the sub-sections in question have to be considered alongside enforcement provisions which are potentially available to any judgment creditor who obtains a financial award in the Authority or, on a challenge, the Court.

[14] By way of elaboration, a compliance order may be made against an individual who does not observe or comply with any order made by the Authority;⁷ the Court has a similar power.⁸ The Court may impose sanctions where a compliance order is not met, including the sequestration of property, the imposition of a fine up to \$40,000 and, as a last resort, imprisonment for a term not exceeding

three months.⁹

[15] A further method of enforcement is available under s 141 of the Act, which provides that any order made by the Authority or Court may be filed in the District Court; it is then enforceable in the same manner as an order of judgment made by

that Court.¹⁰

⁶ Section 135(4A).

⁷ Sections 137 - 138.

⁸ Section 139.

⁹ Section 140.

¹⁰ Section 141.

[16] Several options may also be available in a given case under the [Insolvency Act 2006](#). These include, obviously, adjudication;¹¹ but there are other alternatives, such as summary instalment orders,¹² and the no asset procedure.¹³ During bankruptcy, there are options such as composition¹⁴ and the possibility of a proposal.¹⁵

[17] The possibility of orders being made under [s 123\(2\)](#) or s 131A of the Act may be appropriate in circumstances where the interests of justice justify such a step. One obvious example is where payment of a judgment debt by instalments, made in a timely way, may allow an employer to continue trading: this could perhaps preclude an alternative outcome whereby full payment might force an employer to cease its business, to the detriment of it and workers which it may employ. However, there may well be other circumstances where the tools available to the Court under provisions such as [ss 123\(2\)](#) and [131\(1A\)](#) are not appropriate, and where it is preferable for the parties to resolve enforcement payment according to the other enforcement processes which are available to them.

Analysis

[18] The submission made for Heather Fuimaono that a debt of nearly \$40,000 should be discharged at the rate of \$100 per month is plainly unrealistic. It would be wholly unfair to Ms Houia to be paid the outstanding sum over more than 33 years, particularly where other enforcement options may result in more realistic possibilities. Given the circumstances, an order for payment by instalments (only) is not appropriate.

[19] The submission made for Mahia Fuimaono was that she could not afford any payments. The inference is that the Court should direct that she be relieved of any obligation to do so. The sub-sections in question do not allow for this possibility. The Court may exercise its discretion to order payment by instalments, or it may

decline to do so. It does not have the choice of deciding that a party should not be

¹¹ [Insolvency Act 2006, ss 36 and 45](#).

¹² [Sections 340 – 360](#).

¹³ [Sections 340 – 360](#).

¹⁴ [Sections 312 – 324](#).

¹⁵ [Sections 325 – 339](#).

liable at all.¹⁶ I am not persuaded that the sub-sections in question provide an appropriate basis for dealing with Mahia Fuimaono's liability to Ms Houia.

[20] Accordingly, I dismiss both applications so that other options can be explored.

[21] The Court has not been advised as to whether the applicants are in receipt of legal aid for the purposes of the present application. I accordingly reserve costs.

[22] There is a likelihood that the parties will engage in further litigation as to enforcement options; if represented, they will

be liable for costs, even if these are funded in the first instance under the [Legal Services Act 2011](#). Given the circumstances, I wish to consider the possibility of directing the parties to attend mediation, where all options could be discussed quickly, directly and constructively. I invite counsel to confer as to this possibility; and then either file a joint memorandum, or if necessary, separate memoranda, within seven days.

B A Corkill

Judge

Judgment signed on 5 July 2017 at 2.15 pm

16 Unlike s 143 of the District Courts Act 2016.

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