

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 46/09
5146399

BETWEEN	DOREEN LELIEVELD Applicant
AND	TIR NA NOG ENTERPRISES LIMITED First Respondent
AND	GERARD DESMOND COX Second Respondent
AND	ROSINA COX (nee MORRISON) Third Respondent

Member of Authority: Alastair Dumbleton

Representatives: Kerry Single, advocate for Applicant
No participation by Respondents

Investigation Meeting: 11 February 2009

Determination: 13 February 2009

DETERMINATION OF THE AUTHORITY

Application for compliance orders

[1] In September 2008 the Authority determined that Ms Doreen Lelieveld had been unjustifiably dismissed by the first respondent, Tir Na Nog Enterprises Limited. The company was ordered to pay her \$6,808 gross to reimburse her for remuneration lost as the result of the dismissal, and \$5,000 net as compensation for hurt feelings, humiliation and distress suffered by her. A further award was made of \$809.28 gross in arrears of wages and holiday pay assessed as due to Ms Lelieveld.

[2] The determination of the Authority (Janet Scott) is dated 22 September 2008 and was issued under AA331/08.

[3] A further determination made by the Authority in October 2008 (AA331A/08) fixed costs of \$1,570 to be paid by Tir Na Nog Enterprises Limited to Ms Lelieveld.

[4] In the present application Ms Lelieveld seeks to enforce those determinations with an order of compliance made under s 137 of the Act, requiring the company to pay her the money awarded.

[5] A copy of the application alleging a failure to pay those amounts has been served on the company at its registered office. I am satisfied that service of the Notice of Investigation Meeting has also been effected at the same address.

[6] The company took no steps to respond or reply to the compliance application and did not participate in the investigation meeting on 11 February 2009, which was conducted by telephone conference.

[7] An email received by the Authority from "*Dessie Cox*" on 22 January 2009 indicates plainly if crudely that the company and Mr Cox and his wife are not interested in responding to the application and have no intention of paying the amounts owed to Ms Lelieveld.

[8] I find that Tir Na Nog Enterprises Limited is a person who has not observed or complied with a determination (two of them) made or given under the Act by the Authority. Accordingly, under s 137(2) of the Act the Authority may order Tir Na Nog Enterprises Limited to do any specified thing for the purpose of preventing further non-observation or non-compliance with its determinations.

[9] Under s 137(3) the Authority must specify a time within which its compliance order is to be obeyed.

Compliance Order

[10] The applicant is entitled to the order which I now make. Tir Na Nog Enterprises Limited is ordered to pay Doreen Lelieveld \$12,617.28, being the total of the amounts set out at paras.[39], [40] and [41] of the Authority's determination dated 22 September 2008. Further, Tir Na Nog Enterprises Limited is to pay Ms Lelieveld the sum of \$1,570, being the costs awarded to her by the Authority in its determination dated 16 October 2008.

[11] Those amounts are to be paid by Tir Na Nog Enterprises Limited before 27 February 2009.

[12] If this order is not complied with Ms Lelieveld may apply to the Employment Court for the exercise of its enforcement powers under s 140(6) of the Act.

[13] The application made by Ms Lelieveld against the second and third respondents, the Coxs', is more problematic. Gerard Cox, the second respondent, is listed as a director and shareholder of the first respondent, and so is Rosina Morrison (now Rosina Cox) the third respondent.

[14] The action taken against them is in their capacity as directors and shareholders of Tir Na Nog Enterprises Limited and is reliant on certain provisions of the Companies Act 1993.

[15] Section 97 of that Act creates liability on the part of shareholders of a company in certain situations. None of those situations would appear capable of arising in this case. In any event there is no evidence or information before the Authority to establish that they have.

[16] The second provision relied upon is s 131 of the Companies Act under which directors have a general duty to act in good faith and in the best interests of the company.

[17] As explained to Mr Single, the Coxs' as directors and shareholders of Tir Na Nog Enterprises Limited were not themselves Ms Lelieveld's employer. There was no employment relationship between those parties. Further, any remedies available against directors and/or shareholders under the Companies Act are not obtainable by order of the Authority, which may only exercise the jurisdiction of the District Court or High Court, under s161 of the Employment Relations Act 2000, where those Courts can make an order under any enactment or rule of law relating to contracts. The Companies Act is not such an enactment, particularly insofar as it governs the relationship and the obligations between shareholders and directors and the company, which is not a contractual relationship.

[18] I therefore make no orders against the second and third respondents, the Coxs.'

Costs

[19] Ms Lelieveld is entitled to recover costs to reimburse her for the expense of having to bring this compliance application. I fix those costs at \$350 as a contribution to Mr Single's advocacy fees, and \$70 to reimburse the cost of filing the application.

[20] Tir Na Nog Enterprises Limited is to pay the total of \$420 to Ms Lelieveld in addition to the amounts specified above in the order of compliance.

A Dumbleton
Member of the Employment Relations Authority