

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2013] NZERA Auckland 424
5428399

BETWEEN PRASANNA PATEL
Applicant

A N D KANGNAI FOOTWEAR
LIMITED
Respondent

Member of Authority: Anna Fitzgibbon

Representatives: Danny Gelb, Advocate for Applicant
Garry Pollak, Solicitor for Respondent

Investigation: On consideration of the papers
Submissions received: 13 September from Applicant
None from Respondent

Date of Determination: 18 September 2013

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] On 8 July 2013, the Authority issued a determination¹ making the following orders:

Kangnai Footwear Limited (Kangnai) “ is ordered to pay the sum of \$6000 compensation to Ms Patel pursuant to s123(1)(a) of the Employment Relations Act (“the Act”) for humiliation, loss of dignity and injury to feelings suffered by her as a result of her unjustified dismissal; ... the sum of \$6,656 gross being reimbursement of wages lost by Ms Patel as a result of the dismissal pursuant to s.128(2) of the Act; ...interest at the rate of 5% per annum on lost wages of \$6,656 gross from the date of determination which will continue to accrue until payment is made to Ms Patel...holiday pay of 8% per annum on wages earned by Ms Patel during her employment by Kangnai...

¹ [2013] NZERA Auckland 291

[2] On 15 August, the Authority issued a determination² ordering Kangnai to contribute a total of \$6071.56 towards Ms Patel's costs.

[3] On 26 July, Kangnai filed an application in the Employment Court seeking a de novo hearing of Ms Patel's employment relationship problem ("problem") and the matter has been assigned file number ARC57/13.

[4] By letter dated 29 July, Mr Gelb for Ms Patel sent an email to Kangnai's representatives seeking confirmation as to when the amounts ordered by the Authority were to be paid to Ms Patel. The response received was that Kangnai had "*appealed*" the Authority's determination.

[5] On 7 August, the Authority received an application on behalf of Ms Patel, for a compliance order in respect of the determination dated 15 August, a penalty for failure to comply with the determination and costs pursuant to the Act.

[6] On 21 August, after taking legal advice, Kangnai paid Ms Patel the holiday pay ordered by the Authority to be paid. However, Kangnai has failed to pay any of the other sums of money ordered to be paid to Ms Patel.

[7] On 21 August, Mr Pollak on behalf of Kangnai filed a statement in reply to the application for compliance order and an application for a stay of proceedings pending determination by the Employment Court of Kangnai's application for a de novo hearing of Ms Patel's problem. The application for stay is opposed by Ms Patel.

[8] The parties have agreed for the Authority to determine the application for compliance order and the application for stay on the papers. An opportunity was given to both parties to file submissions and on 13 September Mr Gelb filed submissions on behalf of Ms Patel. No submissions were received on behalf of Kangnai.

[9] Kangnai has an obligation to make payment to Ms Patel of the sums ordered to be paid by the Authority in its determination dated 8 July. Mr Ke Ling, the owner of Kangnai resists the application for compliance order and claims Kangnai's business to be small, that the business has not made a profit since it was set up and is partially funded by Mr Ling's family and from his savings.

² [2013] NZERA Auckland 361

[10] Mr Ling has not provided any details of Kangnai's financial position nor any details of the funding arrangements. Ms Patel says she is suffering financial hardship and says is deeply concerned that Kangnai will be wound up to avoid payment to her in the event Kangnai's application for a de novo hearing of the problem is not successful in the Employment Court.

[11] It may be that Kangnai is in a precarious financial position but at the moment there is insufficient evidence before the Authority to identify with any certainty that is the case.

[12] Kangnai has applied for a stay of the proceedings for compliance order. Mr Ling says an application has been filed by Kangnai in the Employment Court pursuant to s179 of the Employment Relations Act ("the Act") for Ms Patel's problem to be determined de novo. Mr Ling says Kangnai can not afford to pay the total sums of money ordered to be paid by it to Ms Patel by the Authority and offers to pay half of the amounts ordered by way of security.

[13] Section 180 of the Act states that the making of an election to have the problem heard de novo by the Court pursuant to s179 of the Act "*does not operate as a stay of proceedings of the determination of the Authority unless the court, or the Authority, so orders*".

[14] As stated above there is insufficient evidence of Kangnai's financial position and the making of an election under s180 of the Act by Kangnai does not operate as a stay of the compliance order proceedings. The Authority's power to order compliance and to order a stay of proceedings are discretionary. In the circumstances it is appropriate to make the compliance order sought by Ms Patel and not to order a stay. In the circumstances, I do not intend ordering payment of a penalty by Kangnai.

[15] Pursuant to s.137 of the Act, Kangnai is ordered to pay to Ms Patel the sums ordered in the determination dated 15 August³ being \$6000 compensation, the sum of \$6,656 gross being reimbursement of wages lost by Ms Patel together with interest at the rate of 5% per annum. These sums are to be paid by Kangnai to Ms Patel within 14 days of the date of this determination.

³ Fn 1

Costs

[16] Kangnai is ordered to contribute Ms Patel's filing fee of \$71.56 which is to be paid within 14 days of the date of this determination.

Anna Fitzgibbon
Member of the Employment Relations Authority