



been unjustifiably dismissed. I awarded the applicant \$12,000 compensation for humiliation and injury and 3 months lost wages.

[2] In my determination WA 117A/09 (9 October 2009), and in the absence of any submissions by the company, I awarded Mr Pollock, as a contribution to his fair and reasonable costs, \$3,000.

[3] Mr Pollock now seeks compliance with both determinations, asks that the second respondent be directed to ensure compliance by the first respondent, and additional costs – amended statement of problem filed 13 October.

[4] The parties have not undertaken mediation in respect of this problem.

### **Investigation**

[5] During a telephone conference on 9 November the parties agreed that the Authority should make a determination on the parties' submissions to be filed no later than 16 November.

[6] Given the history of this problem and the parties' agreement that the Authority should proceed to make a compliance determination, I was satisfied mediation would not contribute constructively to resolving this matter.

### **Respondents' Position**

[7] In its statement in reply received on 27 October the respondents advised:

- a. *We haven't paid their determination as we are in the process of filing an application of leave as well as a stay of proceedings ... . We believe the amount determined is excessive & overstated.*

[8] In submissions received on 13 November, the company's representative, Ms Forrest, advised that the first respondent had filed an application for leave in the Employment Court on 30 October but, due to error, was obliged to re-file the same on 12 November.

[9] The company was unable to attend the Authority's investigation on 18 August due to be extremely short staffed at the time and all efforts being concentrated on property settlements, a major restructure and a re-banking situation. It would otherwise have been compromised. Mr Thurston was unavailable for a long period of time due to the same situation, but both respondents have not actively obstructed the Authority's investigation.

[10] The company is solvent: liquidation applications in the High Court were withdrawn today (13 November).

[11] The company and Mr Thurston ask that the compliance orders sought by the applicant be held pending the outcome of the application for leave filed in the Employment Court and, if granted, the outcome of the challenge that is to be filed.

### **Applicant's Position**

[12] Following receipt of the Authority's determination the applicant wrote to the company on 24 August and 1 September seeking compliance in respect of the 21 August determination (copies attached to SoP): no response was received.

[13] On 23 September the company advised it would be appealing the Authority's 21 August determination.

[14] At the time of filing its original compliance application (6 October), and despite "*advice*" (par 2.8, statement of problem) from the Authority in regard to the 28 day challenge time, no statement of claim has been served nor has a request been lodged for leave to challenge out of time.

[15] In judgement number CIV-2008-454-940 dated 27 August 2009 the second respondent, in his capacity as sole director, claimed the company was solvent. Mr Thurston, in his capacity as sole director, is responsible for the company not meeting the remedies ordered by the Authority.

[16] By letter to Mr Thurston dated 28 October Mr Tayler communicated his views of the likelihood of the respondents successfully appealing the Authority's

determination and, amongst other things, invited it to “*pay the full amount into the Court’s trust account for the benefit of the successful party*”. It has not done so.

[17] In submissions received on 9 November Mr Tayler summarised the above, pointed out “*it has now been 7 weeks since the first respondent advised*” of its intention to file challenge the Authority’s determination and file an application for leave yet it had still not done so.

[18] The applicant rejects the company’s claim it tried to talk to him directly to resolve the problem: there has been no contact in relation to these proceedings, and it is misleading to claim there has.

[19] The company has not challenged the Authority’s costs determination and has refused to pay those monies.

[20] The company is simply using delaying tactics to withhold the fruits of the Authority’s determinations and accordingly Mr Pollock seeks a compliance order to have the company pay within 14 days.

[21] The grounds for opposing the compliance order are misconceived and do not address the fact of Mr Pollock’s success.

[22] The company does not appreciate that its application for leave to the Employment Court is not a technical matter, free from any obstacles, but is a significant hurdle. It will be vigorously opposed by the applicant.

[23] Section 180 of the Employment Relations Act 2000 (the Act) any way makes clear that a challenge to an Authority determination does not operate as a stay.

[24] The reasons advanced as to Mr Thurston’s non-availability to participate in the Authority’s substantive investigation are not credible as it was previously claimed by Ms Forrest, in an email the day after, that the second respondent had not attended as he “*has been off work sick ...*”.

[25] In the absence of any reference to the established principles being relied upon in respect of this type of proceeding the Authority is requested to issue the compliance orders sought.

## **Discussion and Findings**

### **First Respondent**

[26] I note here the records of Authority support staff discussions with Ms Forrest on 13 & 14 October during which it was made clear that a compliance application had been filed and would proceed unless a stay was obtained from either the Authority or the Employment Court; Mr Tayler's advice of 28 October also spelt out the company's position and steps open to it.

[27] I agree with Mr Tayler's submissions: the company is not relying on any established principles in attempting to avoid the compliance order sought by Mr Pollock. By its own admission it is solvent. Its submissions do not respond to Mr Tayler's suggestion that it should consider paying the disputed sums into a trust fund while attempting to seek leave of the Employment Court to challenge out of time the Authority's substantive determination.

[28] Consistent with s. 180 of the Act the company, within 14 days of the date of this determination is to pay to Mr Pollock:

- a. The sum of \$12,000 (twelve thousand dollars) compensation for hurt;
- b. \$3,000 (three thousand dollars) as a contribution to his fair and reasonable costs; and
- c. 3-months lost remuneration less income earned during that period. Leave is reserved for the latter to be returned to the Authority in the event the parties are unable to agree on the same.

**Second Respondent**

[29] Despite not opposing his late joinder as a respondent, but as the evidence is of the company being solvent, there is no basis, at this stage, for the Authority to order compliance against Mr Thurston.

**Costs**

[30] I accept that the costs sought in respect of this matter, of \$1,254.95, are – in all the circumstances – fair and reasonable and direct the first respondent to pay that amount.

**Determination**

[31] Within 14 days of the date of this determination, and by way of a compliance order pursuant to s. 137 of the Act, the company is directed to comply with my original determination and pay to Mr Pollock:

- a. \$12,000 (twelve thousand dollars) compensation for humiliation and injury to feelings; 3-months lost remuneration less income earned during that period. Leave is reserved for the latter to be returned to the Authority in the event the parties are unable to agree on the same; and
- b. As a contribution to Mr Pollock's original fair and reasonable costs, \$3,000 (three thousand dollars).

**Costs**

[32] In respect of this determination, the company is to pay Mr Pollock's costs of \$1,254.96.

**Denis Asher**

**Member of the Employment Relations Authority**