

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 117/08
5115749

BETWEEN

LANCE RICHMOND
Applicant

AND

ARMSTRONG ALARMS
LIMITED
Respondent

Member of Authority: Marija Urlich

Representatives: Max Whitehead, for Applicant
Peter Elder, for Respondent

Investigation Meeting: 27 March 2008

Determination: 28 March 2008

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] Mr Richmond makes application for a compliance order against Armstrong Alarms Limited. Compliance is sought with determinations AA 366/07 dated 21 November 2007 and AA 13/08 dated 17 January 2008. Interest calculated on those sums is also sought as are penalties and costs.

[2] Armstrong Alarms, in its statement in reply, acknowledges the awarded sums have not been paid. However, it says this is not a situation of non-compliance because, due to its financial circumstances, it is unable to pay the award amounts in a lump sum. Armstrong Alarms seeks an order from the Authority that those payments are made by instalment¹, which it has unilaterally implemented. To date Mr Richmond has received payment of outstanding holiday pay entitlement, 2 weeks wage arrears and \$1000. The next payment of \$1000 was due this week. At date of hearing it had not yet been made.

¹ Section 138(4A) Employment Relations Act 2000

Non-compliance

[3] Mr Terry McMahon, a director of Armstrong Alarms, told me the business is not profitable. He said given its overdraft limit and debtor and creditor situation the business cannot afford to pay Mr Richmond instalments of more than \$1000 per month. The business continues to trade and employs two staff. Mr McMahon said the profitability of the business had not changed in the last 12 months.

[4] Mr Richmond opposes instalment payments. He does not accept that the directors are unable to pay the award sums. He has no confidence that Armstrong Alarms will meet the proposed instalment payments because the second instalment was due this week and at time of hearing had not been paid.

[5] The documents provided to the Authority show the first time the respondent raised any financial difficulty in meeting the award was in late February 2008 after Mr Richmond had made demand for the award sums. Armstrong Alarm's financial difficulties were not raised during the investigation of the substantive matter (as envisaged by subsection 123(2)). The request for instalment payment would have been stronger if it had been, given Mr McMahon's evidence that the circumstances of the business have not changed in the last 12 months. I am not satisfied that Armstrong Alarm's financial circumstances require instalment payments. The request is declined.

[6] I am satisfied that Armstrong Alarms has not complied with my determination of 21 November 2007. I am satisfied that there is no satisfactory excuse or justification for Armstrong Alarm's continuing failure to comply.

[7] I make the same finding in relation to my determination of 17 January 2008. Given the recent date of that determination it is appropriate to provide an extended period in which compliance is ordered.

Penalty

[8] Mr Richmond seeks a penalty for holiday pay due and owing at dismissal and a penalty for the unpaid notice period. Both sums have been paid.

[9] The calculation of Mr Richmond's holiday pay entitlement has been the subject of ongoing discussions between the parties. The parties have now concluded those discussions. A penalty is not warranted in such circumstances.

[10] The award of two weeks notice enforced the agreement between the parties. Armstrong Alarms failed to meet that obligation until payment was made in late February 2008. No reasonable justification has been given for the delay. However, I do not believe a punitive order is warranted.

Interest

[11] The Authority's jurisdiction does not extend to orders for payment of interest on sums for which the compliance order have been made².

Orders

[12] **Armstrong Alarms Limited is ordered to comply with my determination of 21 November 2007 by 30 April 2008.**

[13] **Armstrong Alarms Limited is ordered to comply with my determination of 17 January 2008 by 30 May 2008.**

Costs

[14] At the investigation meeting I received submissions from the representatives as to costs. Mr Whitehead advises Mr Richmond's costs in relation to this application total \$2900 and seeks a contribution to those costs. Mr Elder submits costs should lie where they fall given this is not a situation of non-compliance.

² *Wolfenden v The NZ Film and Television School Ltd* [1999] 2 ERNZ 21, at p31.

[15] Mr Richmond is entitled to a contribution to the costs he has incurred in pursuing this compliance application, including the fee incurred in lodging this application in the Authority.

[16] **Applying the principals applicable to a consideration of costs in the Authority³ Armstrong Alarms Limited is ordered to pay \$1070 to Lance Richmond as a contribution to costs.**

Marija Urlich

Member of the Employment Relations Authority

³ *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808