

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 84
5614573

BETWEEN ALAN ROBINSON
 Applicant

AND PACIFIC SEALS (NZ) LIMITED
 First Respondent

A N D GRAHAM TREVOR WILTON
 Second Respondent

Member of Authority: Michele Ryan

Representatives: Tanya Kennedy, Counsel for Applicant
 John Tannahill, Counsel for the First and Second
 Respondents

Investigation Meeting: 14 July 2016 in Wellington

Submissions Received: On the day of the investigation meeting from the
 Applicant
 No documents received from the Respondents

Determination: 18 July 2016

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] In a determination dated 22 January 2016¹ the Employment Relations Authority ordered the first respondent, Pacific Seals (NZ) Ltd (PSL), to contribute \$5,571.56 towards costs accrued by the applicant, Mr Alan Robinson, to have his substantive claims determined.

[2] PSL has not made payment in respect of the order of 22 January 2016.²

¹ *Robinson v Pacific Seals (NZ) Ltd* [2016] NZERA Wellington 11

² On 24 February 2016 the applicant contacted the first respondents' representative seeking payment of the sum ordered.

[3] Mr Robinson seeks an order that the first and second respondents comply with the Employment Relations Authority's order of 22 January 2016. Interest on that amount plus the filing fee and indemnity costs associated with this application is also sought.

[4] The second respondent in this matter is Mr Graham Wilton, the director of Pacific Seals (NZ) Ltd.

The Authority's investigation

[5] Mr Robinson's application was lodged on 11 March 2016.

[6] On 29 March 2016 the Authority held a case management call with Mr Robinson's counsel to discuss how best to progress the application having previously been advised by the respondents' barrister that PSL had no money or assets and he had been instructed not to attend the call.³

[7] A statement in reply was later lodged by the second respondent.⁴ That document advised that Mr Wilton should not be involved in the proceeding noting that any costs owed is the responsibility of the first respondent but that it [PSL] "*did not want to pay*".⁵ A memorandum attached to the statement in reply and filed by Mr Wilton's barrister advised "*in the interest of justice I request that Mr Wilton be given an opportunity to be heard*".

[8] Given the content of the memorandum the original scheduling for the investigation meeting was set aside. Another case management call was held. The parties' representatives agreed to a date for an investigation meeting and timetable for the exchange of information, albeit these were later varied at the respondents' representative's request.

[9] The respondents did not meet the revised timetable.⁶ Following the Authority's inquiries on the matter counsel for the respondents informed the Authority that no documentary information would be furnished. Ten days before the scheduled investigation meeting counsel advised Mr Wilton had left New Zealand but that

³ by email on 24 March 2016

⁴ on 1 April 2016

⁵ the first respondent did not file a statement in reply

⁶ 27 June 2016

\$5,571 had been paid into a solicitors trust account.⁷ Two days before the investigation counsel for the respondent advised he would not be attending the meeting.

Discussion

[10] The order of 22 January 2016 was against PSL. Subsequent assertions made by counsel⁸ that PSL was impecunious and therefore not able to comply with the order have been undermined by more recent statements⁹ that the monies owed are held in a trust account.

[11] It remains unclear why PSL has not acted in accordance with the determination of 22 January 2016 and paid Mr Robinson the ordered sum. In these circumstances I am not persuaded that PSL will meet its obligations to Mr Robinson without the imposition of a compliance order.

[12] Mr Wilton was not a party to the employment relationship problem, or the proceedings which led to the order of 22 January 2016. He therefore has no personal obligation to comply with the order. However in *Northern Clerical Workers Union v Lawrence Publishers Co of New Zealand Ltd*¹⁰ the Labour Court referred to a series of cases where it had been determined, to the extent a third party (such as a director of an employer company) had the ability to ensure a company met its liabilities, that that party may be bound by a compliance order to that effect.¹¹ The Court stated:

*In each of if those cases third persons were bound by compliance orders, not to make payment of a respondent's debt from their own pockets, but to take the steps which were in their power to ensure the liability was met by the person upon whom the liability fell.*¹²

[13] In *Health and Body Clinic Ltd v Zhao* [2011] NZEmpC 51 Judge Perkins affirmed the approach taken in *Lawrence Publishers* and noted that s 137 of the Employment Relations Act empowers the Authority to make similar such findings if properly factually based.

⁷ 15 July 2016

⁸ By email on 24 March 2016 and during the case management conference call on 19 April 2016.

⁹ Emails of 5 and 12 July 2016

¹⁰ [1990] 1 NZILR 717

¹¹ Pursuant to s 207, a provision under the Labour Relations Act 1987 corresponding but not identical to s 137 of the Employment Relations Act

¹² Ibid at p 721

[14] As noted Mr Wilton is the sole director of PSL. I understand he coordinated PSL's payment of compensation to Mr Robinson following his personal grievance claim. I have no reason to conclude he no longer has the power to take steps to ensure PSL's outstanding debt to Mr Robinson is met.

Order

[15] I consider it appropriate to order Mr Graham Wilton to make whatever arrangements necessary to have Pacific Seals (NZ) Limited comply with the order of 22 January 2016 and pay Mr Robinson the sum of \$5,571.56 within 10 days of this determination.¹³ This order is distinct from a finding that Mr Wilton is personally liable for the debt.

[16] Mr Robinson is entitled to interest on that sum at the rate of 5% per annum beginning 23 January 2016 until the date of payment.¹⁴

Comment

[17] PSL needs to be aware that should it fail to comply with the direction above Mr Robinson may make an application for compliance in the Employment Court. Where the Court is satisfied that any person has failed to comply with a compliance order under s 137, the Court may amongst other things, order additional remedies including an order that the person in default be sentenced to imprisonment for a term not exceeding three months, and/or a fine not exceeding \$40,000.¹⁵

Costs

[18] The Authority has evidence of the costs incurred by Mr Robinson in pursuing this application. I have no doubt that PSL's approach to these proceedings have unreasonably increased those costs. Pacific Seals (NZ) is further ordered to contribute \$700 plus the cost of filing fee of \$71.56 towards costs incurred with this application.

Michele Ryan
Member of the Employment Relations Authority

¹³ Pursuant to ss 137(2) and (4) of the Employment Relations Act

¹⁴ Payment of interest at the rate prescribed under section 87(3) of the Judicature Act 1908

¹⁵ Section 140(6)