

**IN THE EMPLOYMENT COURT  
AUCKLAND**

**[2012] NZEmpC 198  
ARC 62/12**

IN THE MATTER OF     an application for leave to file challenge  
                                out of time

BETWEEN                ABC01 LIMITED (FORMERLY  
                                PRIMARY HEART CARE LIMITED)  
                                Plaintiff

AND                     HOWARD DELL  
                                Defendant

**ARC 65/12**

IN THE MATTER OF     an application for compliance order

BETWEEN                HOWARD DELL  
                                Plaintiff

AND                     ABC01 LIMITED (FORMERLY  
                                PRIMARY HEART CARE LIMITED)  
                                First Defendant

AND                     JOHN WILLIAM HINCHCLIFF  
                                Second Defendant

Hearing:                26 November 2012  
                                (Heard at Auckland)

Appearances: Tane Rakau, agent for ABC01 Limited  
                                Howard Dell in person

Judgment:              26 November 2012

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**INTERLOCUTORY JUDGMENT NO 2 OF CHIEF JUDGE G L COLGAN**

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[1] The conditions on which ABC01 Limited had leave to challenge out of time<sup>1</sup> have not been satisfied so that there is now no entitlement in law for the company to challenge the Authority's determination.<sup>2</sup>

[2] I am satisfied from Mr Dell's affidavit evidence that ABC01 Limited has paid none of the money, due under the Authority's determination, to him. None has been paid to the Registrar. Mr Rakau has confirmed that the company has not paid the sums ordered on 6 November 2012.

[3] Although I am satisfied that ABC01 Limited has been served with these proceedings and indeed has entered an appearance to oppose them, Mr Hinchcliff, who was joined as a second defendant in the judgment issued on 6 November 2012, may not have been served formally with notice of the proceedings for compliance that are now against him and, therefore, may not be on notice of the risk that he faces of monetary penalty, sequestration of his property, or even imprisonment. Mr Rakau did not accept that he was representing Mr Hinchcliff, at least in the sense that is necessary for service to be acknowledged.

[4] So, whilst I will make an order imposing sanctions for the company's non-compliance with the Authority's compliance order, I will not do so in respect of Mr Hinchcliff personally unless and until I am satisfied that he has been served formally with the Court's judgment of 6 November 2012 and with a copy of this judgment.

[5] As already noted, the company's failure to meet the conditions upon which the order for execution of the Authority's determination was made means that there is now no stay of that determination requiring the company to pay \$186,666.66 plus disbursements to Mr Dell.

[6] I am satisfied that ABC01 Limited (formerly Primary Heart Care Limited) has failed or refused to comply with the compliance order<sup>3</sup> of the Authority to pay the sum of \$186,738.22 (including disbursements) to Mr Dell. Pursuant to s 138(6) and 140(6) the court is empowered to make orders contained in that latter section.

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<sup>1</sup> [2012] NZEmpC 188.

<sup>2</sup> [2012] NZERA Auckland 272.

<sup>3</sup> [2012] NZERA Auckland 318.

[7] In addition to serving a copy of this judgment on ABC01 Limited at its address for service filed with the Court, I direct that Mr Dell also serve a copy of this judgment on ABC01 Limited at its registered office, and that a further copy of this judgment be served on John William Hinchcliff personally. In the likely event of service not being acknowledged, Mr Dell will have to prove service by affidavit.

[8] Mr Dell has drawn to the Court's attention the registration of a new company which bears ABC01 Limited's former name, that is Primary Heart Care Limited. This is, however, a newly registered company and although the documentation for its incorporation was presented by Mr Hinchcliff, the company's other essential details are Ngai Tupango's, that is its registered office, its address for service, its shareholding (Ngai Tupango Incorporation), and its director, "HAPUU Whanua". This is, therefore, not the same corporate entity as the party in this proceeding, ABC01 Limited, which formerly bore the name Primary Heart Care Limited. The registration by Ngai Tupango of a new company in these terms does not, therefore, affect Mr Dell's right to continue his proceeding against ABC01 Limited (formerly Primary Heart Care Limited).

[9] To allow for service by Mr Dell on these persons, for the 14 day period for compliance to expire, and to allow for Mr Dell to prove service, the hearing is adjourned until 10 am on Friday 14 December 2012.

[10] Mr Hinchcliff should be on notice that if there is still no compliance by that time, Mr Dell will no doubt seek, and the Court will likely grant against Mr Hinchcliff personally, the enforcement remedies set out in s 140(6) of the Employment Relations Act 2000 which may include an order for Mr Hinchcliff's imprisonment for a term not exceeding three months, an order that he be fined sums not exceeding \$40,000, and an order that his property be sequestered.

[11] I again urge Mr Hinchcliff in particular (and ABC01 Limited) to take competent professional legal advice about their situations.

[12] I now deal with Mr Dell's application for sanctions in respect of ABC01 Limited. Mr Dell seeks these against the company including the imposition of a fine

not exceeding \$40,000 and an order that the company's property be sequestered. It is not possible for an incorporated company to be imprisoned. The remedy of sequestration of a person's assets is involved and complex. The Court needs to appoint an appropriate person as a sequestrator, nominated by the applicant, and requires the agreement of the person to act as sequestrator. The applicant must undertake to meet the sequestrator's costs and liability for doing so may be a very real possibility if the assets sequestered are not sufficient to cover those costs. The Court will require a programme of reporting by the sequestrator. There are other similar technical requirements in practice to obtain the remedy of sequestration. Mr Dell, apart from asking for an order for sequestration, has not put in place proposals for the necessary infrastructure and I imagine it will be difficult for him to do so for a variety of reasons including his impecuniosity, his overseas domicile, and his layperson status. In those circumstances, I adjourn *sine die* Mr Dell's application for an order of sequestration against ABC01 Limited, although he may bring this back on for hearing if he provides what I described as that necessary infrastructure for a sequestration order.

[13] That leaves the question of a fine. I have no information about the company's financial circumstances or ability to meet a fine. Its non-compliance has, nevertheless, been contumacious.

[14] In these circumstances, I accept that it is appropriate to fine ABC01 Limited for its failure or refusal to comply with the compliance order made by the Employment Relations Authority or to take any step to address its responsibilities to Mr Dell. One-quarter of the maximum fine is an appropriate level and I therefore order ABC01 Limited to pay a fine of \$10,000 to the Crown. This will not absolve the company from complying with the Authority's compliance order as set out in [6] of this judgment but adds to it.

GL Colgan  
Chief Judge

Judgment signed at 5 pm on Tuesday 27 November 2012