

**Attention is drawn to the order  
prohibiting publication of  
certain information**

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 172  
5308294

BETWEEN MARIE-ANNE DALLIMORE

Applicant

A N D

WHOLESALE BUYING  
LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Gerald Nation/Sarah Waggott, Counsel for Applicant  
Penny Shaw, Counsel for Respondent

Submissions Received: Respondent (applying party) 23 July 2012  
Applicant (opposing party) 31 July 2012

Date of Determination: 15 August 2012

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**DETERMINATION OF APPLICATION UNDER  
SECTION 123(2) OF THE EMPLOYMENT RELATIONS ACT 2000  
TO MAKE PAYMENT BY INSTALMENT**

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**Prohibition of publication**

[1] Ms Shaw makes an application on behalf of the respondent for the prohibition from publication of the information provided by the respondent in support of its application for payment of orders by instalment. This application was not opposed by Mr Nation.

[2] Ms Shaw does not limit the information to be prohibited from publication. Her application could refer to the year end accounts for 2011 and draft accounts for 2012 or it could extend to any reference to the financial position of the respondent in the submissions.

[3] There will have to be some reference generally to the state of the respondent's business in the determination. I prohibit from publication the end of year accounts of 2011 and draft accounts for 2012 and the information about the respondent business contained in paragraphs 6 and 7 of Ms Shaw's submissions.

### **Employment relationship problem**

[4] In a determination dated 1 June 2012 member Philip Cheyne ordered the respondent to pay to the applicant a compensatory sum of \$7,500 together with reimbursement of lost wages between 9 June 2010 and 25 September 2010. The parties agree that the amount for reimbursement of lost wages is \$5,960. Costs were reserved and I have dealt with costs and awarded the sum of \$3,000 to the applicant in determination [2012] NZERA Christchurch 171.

[5] Section 123(2) of the Employment Relations Act 2000 provides:

*Where making an order under subsection 1(b) or (c), the Authority or the Court may order payment to the employee by instalments, but only if the financial position of the employer requires it.*

[6] Ms Shaw submits that the ongoing viability of the business of the respondent and its employees' jobs would be at risk if it was required to make payment in full immediately. She further submits that there is no shareholder excess source of funds to loan to the business. Ms Shaw asks that an order be made providing for payment by instalment of the sum in the determination together with any costs award in the amount of \$200 per month.

[7] Mr Nation in his submission generally accepts that the respondent business is not in a strong financial position. He also accepts that as submitted by Ms Shaw many businesses in Christchurch are struggling following the recent earthquake. In his submission he refers to the absence of any information about the availability of any inter-company loan facilities with more successful operations or a bank loan in support of the application for payment by instalments.

[8] Mr Nation refers the Authority to another Authority determination in *Stein v Garrad's (NZ) Limited*, AA 287/08, in which there was an application under s.138 (4A) of the Act for payment by instalments. Although a provision for compliance orders it had the same wording with respect to the requirements to be made out if the Authority is to order payment by instalments as to s.123(2) of the Act. In *Stein* the

Authority considered the meaning of *requires* in the context of the financial position of the employer. The Authority considered the threshold required before the Authority could be satisfied an order should be made for payment by instalments but did not reach a conclusion about that stating in paragraph [8] - *However, I do consider the appropriate test is more than one of the employer's convenience or preference even when the employer's financial position is not strong.*

[9] Mr Nation submits that the period of time it would take to make payment of the sum referred to in the determination and costs at the rate of \$200 per month is exorbitant and would take in excess of six years. Mr Nation submits that the applicant is not prepared to be an unsecured creditor of the respondent company indefinitely and that there is a risk that the respondent company will be wound up to avoid paying existing creditors. Mr Nation does submit that if the Authority was persuaded that the respondent's company position required it, then the applicant would accept a payment of the sum referred to in the determination and any costs in the following instalments, 50% of the total sum to be paid within seven days of the date of the determination, and the remaining 50% to be paid in equal instalments over the following three months.

### **Determination**

[10] The respondent business is not in a strong financial position. The draft accounts of year ending March 2012 show the business is operating at a loss and liabilities exceed assets. The business was affected by the Christchurch earthquakes and in particular the February 2011 earthquake.

[11] The Authority is persuaded that the respondent's financial position is such that it cannot afford to make payment immediately. The sum offered of \$200 is simply not enough and would mean that the awards made to the applicant would not be satisfied for an unreasonably long period of time and there would be an unsatisfactory risk to the applicant as an unsecured creditor. The Authority will order payment of the sums awarded in the determination, together with the cost awards being the combined amount of \$16,460 by way of instalments for a period not exceeding six months.

[12] I order that the respondent pay to the applicant by way of six equal monthly instalments of \$2,743.33.

[13] The first of the six instalment payments is to be made to the applicant by 5pm on Friday 31 August 2012. The following five payments are to be made by the 20<sup>th</sup> of the month for the months of September, October, November and December with the final instalment due by 20 January 2013. Failure to make payment of the instalments as set out above will result in the whole amount becoming due and owing.

Helen Doyle  
Member of the Employment Relations Authority