

**IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH**

[2014] NZERA Christchurch 118
5511916

BETWEEN KRYSTAL GREEN
 Applicant

A N D C&T INTERNATIONAL
 LIMITED t/a ILAM BAKERY
 Respondent

Member of Authority: David Appleton

Representatives: Jessica Babe, Counsel for Applicant
 Wei Tao, Advocate for Respondent

Investigation Meeting: On the papers

Submissions Received: 21 July 2014 from Respondent
 4 August 2014 from Applicant

Date of Determination: 5 August 2014

DETERMINATION (No 2) OF THE AUTHORITY

- A. The respondent has not produced sufficient evidence to demonstrate that its financial position requires it to pay the remedies awarded to Ms Green by instalments. The remedies awarded to Ms Green are, accordingly, due to be paid without delay.**
- B. Costs are reserved.**

Employment relationship problem

[1] By way of its determination dated 8 July 2014 ([2014] NZERA Christchurch 101), the Authority found that Ms Green had been unjustifiably dismissed and was awarded lost wages in the gross sum of \$774.34, together with compensation pursuant

to s.123(1)(c)(i) of the Employment Relations Act 2000 (the Act) in the sum of \$7,500. The total amount due to be paid is therefore \$8,274.34.

[2] At paragraph [47] of the Authority's determination, as the respondent had stated in its submissions on the substantive issue that the respondent was suffering a difficult financial position, I gave the respondent an opportunity to make an application for payment of the remedies by instalments after the order for reimbursement of wages and compensation had been made. I stated in my determination the following:

However, if the respondent believes that its financial position requires payment of these sums by instalments, it must make an application to the Authority within 14 days of the date of this determination, identifying the instalment programme it says it can pay and, at the same time, providing sufficient affidavit evidence of its financial position to enable the Authority to determine that application.

[3] In response to this direction, Mr Wei Tao sent in an application on behalf of the respondent to pay the total amount due to Ms Green by way of instalments of \$40 a week. Mr Tao provided submissions that stated that the bakery business has only now reached a break-even point, due to a tough business environment and high rental costs. He then detailed what he called the weekly budget for his family which indicated that his family had a discretionary income of \$51 per week after expenses. He stated that:

We don't have any funds to pay the amount \$8274.24 at this stage and also I have to pay my legal fee to my lawyer ... by instalment.

[4] Mr Tao also stated that:

... we can only afford \$40 weekly payments to pay off this amount. Of course, the arrangement can be reviewed if our business is in a better financial position next year.

[5] The application also had attached to it financial statements for the respondent company. This showed a net surplus before depreciation for the year ended 31 March 2014 of \$1,530. Also attached to the application were two statements from the SBS Bank bearing different account numbers but both addressed to Mr Tao and Mrs Chen personally, showing what appeared to be flexi-loan accounts. Together, they showed a total amount owed at May 2014 of approximately \$214,000.

The respondent's submissions

[6] Ms Babe on behalf of Ms Green states that the main liability shown in the respondent company's accounts is a shareholder's current account debt in the sum of \$137,958, which is a debt owed to Mr Tao and Mrs Chen. It does not appear that they are receiving any regular payments from the company towards discharge of this debt. Ms Babe says that the respondent company could obtain a loan to pay its debt due to Ms Green.

[7] Ms Babe also refers to the prejudice that Ms Green would suffer if she had to wait nearly four years to have the sum due paid to her in full. She also refers to the likelihood that costs will also be payable to Ms Green by the respondent and that, if Ms Green cannot get payment of the sums due to her she herself would have to obtain a loan to pay her own legal costs, which would be grossly unfair.

Determination

[8] Section 123(2) of the Act provides that, when making an order under subsection (1)(b) or (c), the Authority may order payment to the employee by instalments, but only if the financial position of the employer requires it.

[9] Despite the information sent in by Mr Tao, it paints only an incomplete picture of the financial position of the respondent company, as it does not provide any information about the ability of the company to borrow money to discharge its debt to Ms Green.

[10] In addition, the family's weekly budget information is irrelevant to the ability of the respondent company to pay the sums due. Secondly, the SBS Bank information appears to be relevant to Mr Tao and Mrs Chen personally, rather than to their company, and the financial statements for the company do not show a liability to the SBS Bank. Indeed, bank charges shown for the year 2014 only total \$894, which strongly suggests that the loan information sent in by the respondent does not relate to the respondent's liabilities.

[11] Finally, despite my direction in the determination dated 8 July 2014, the respondent has not lodged its evidence in affidavit form.

[12] Therefore, I find that I have insufficient evidence before me to persuade me that the financial position of the employer requires the respondent to pay the sums owing to Ms Green by instalments, which is the test set out in s.123(2) of the Act.

[13] I therefore order the respondent to pay the sums set out in the determination of the Authority dated 8 July 2014 in their entirety. These sums are due to be paid now.

Costs

[14] The parties are to seek to agree between themselves how costs in relation to the substantive investigation meeting and the costs of the respondent's application for payment of the remedies by instalment are to be dealt with. If no agreement is reached within 28 days of the date of this determination, then Ms Green may serve and lodge a memorandum of counsel within a further 14 days, and the respondent may reply by serving and lodging a memorandum within a further 14 days.

David Appleton
Member of the Employment Relations Authority