

Attention is drawn to the  
order prohibiting publication  
contained in this determination

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 232  
5283526

BETWEEN

BRENDA BENGE  
Applicant (responding party)

A N D

CANTERBURY LANGUAGE  
COLLEGE LIMITED  
Respondent (applying party)

Member of Authority: Helen Doyle

Representatives: Phil Butler, Advocate for Applicant  
Penny Shaw, Advocate for Respondent

Application Received: 25 September 2012  
Response Received: 11 October 2012

On the papers

Date of Determination: 24 October 2012

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**APPLICATION BY RESPONDENT UNDER S.123(2) EMPLOYMENT  
RELATIONS ACT TO MAKE PAYMENT BY INSTALMENT**

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**Prohibition from publication**

[1] I prohibit from publication the confidential information provided to the Authority and the applicant in support of an application by the respondent for an order for payment of awards made by instalment, on the grounds that its financial position requires it, save as to the limited extent I have had to refer to some of the information in this determination.

**Employment relationship problem**

[2] The respondent applies under s.123(2) of the Act for an order for payment of awards made under s.123(1)(b) and (1)(c)(i) and (ii) of the Employment Relations Act 2000 by instalment on the grounds that the financial position of the employer requires

it. Costs have also been determined and these are also included within the application for payment by instalment although properly should be considered under clause 15(2) of the second schedule to the Act. The Authority in its substantive and subsequent determination as to costs has made orders against the respondent in the combined sums of \$23,871.54.

[3] The applicant opposes the application on the grounds that the Authority does not have jurisdiction to make an order under s.123(2) of the Act after orders have already been made and further on the basis that the financial information provided does not establish that the respondent is not in a position to the applicant immediately.

#### **The respondent's submission**

[4] The respondent attached copies of its statement of financial position as at 31 March 2012 to its submission. The respondent recorded a taxable loss for the last financial year and income reduced by about 50% in the last financial year. The background information described in the submission is that the respondent was heavily impacted by the Christchurch earthquakes on its foreign student numbers. The student numbers dropped significantly after February and had not increased at the time the submission was made. The company has assets but Ms Shaw submits these assets are not available to the respondent. There are cash reserves of about \$85,000. There is a term deposit with a reasonable sum in it that the respondent maintains is necessary for ongoing costs and another trust account balance of which a smaller sum remains from a sum as at 31 March 2012 in excess of \$200,000. This money was used to settle the purchase of a language school in Auckland. There is also mention of a significant loan made to a restaurant business situated in the Christchurch business district which is no longer operating and the money is unlikely to be recovered.

[5] Ms Shaw submits that the purchase of the Auckland business was a necessity to enable the college to continue. She submits that that process of identifying an appropriate school began almost immediately after the February earthquake and was committed to through the signing of the agreement in March 2012. This being prior to the Authority's determination in the matter.

[6] Ms Shaw submits that although there is money available in a fund the respondent will need to start drawing on that money to be able to pay staff, operating expenses and service its mortgage. Her submission is that the respondent will be at



serious risk unless they can pay in instalments and requests an order be made for payment by instalment of the amounts referred in the determination and costs in the amount of at least \$1,000 per month.

### **The applicant's submissions**

[7] The applicant firstly submits that there is no jurisdiction to make an order for payment by instalments. If the Authority does not accept that submission the applicant says that no order should be made to allow payment by instalments.

[8] The applicant asked her accountant to provide a cursory review of the financial statements provided on behalf of the respondent. He noted in a letter provided to the Authority dated 9 October 2012 that the financial statements raised a number of questions. The applicant submits that the information does not establish that the respondent is not in a position to pay the applicant immediately. There was some confusion as to whether the respondent provided incorrect evidence about the identity of the company who operated the restaurant in Christchurch and to whom the loan was made. I am satisfied after further information was provided by Ms Shaw that the name of the company was incorrectly spelt in the financial statements.

[9] Finally the applicant submits that the respondent has sufficient funds to purchase a business in Auckland and will therefore find funds to do what they want to do and that the respondent *has a track record of finding excuses for not doing what they do not want to do* and to date have paid the applicant nothing.

[10] In the event that the Authority determines it has jurisdiction and should allow for payment by instalments then the applicant submits that the respondent should be ordered to pay the amount owing, plus interest at the rate of 5% per annum in three equal consecutive monthly instalments commencing 31 October 2012.

### **The issues**

[11] The Authority is required to determine the following issues:

- Does the Authority have the jurisdiction to make an order for payment by instalment?

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If the Authority does have jurisdiction then should the Authority make an order for payment by instalment and does the financial position of the respondent require an order be made.

**Does the Authority have the jurisdiction to make an order for payment by instalment?**

[11] Section 123 (2) provides:

(2) *When 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.*

[12] Mr Butler's submission is that the respondent cannot come back to the Authority after the orders have been made and seek payment by instalment. If that was what was intended then he submits the words or *where it has made an order* would have been included.

[13] The Authority has previously considered applications under s. 123(2) in at least two cases where orders had already been made under subsection 123(1)(b) or (c) of the Act - *Dallimore v Wholesale Buying Limited* [2102] NZERA 172 and *Smith v Munchies On Marsden Limited* [2012] NZERA 85 (Member Doyle). There was no challenge to the jurisdiction of the Authority on those occasions with argument focused on either the financial position of the employer or the amount of the proposed instalment.

[14] The purpose of s 123 (2) is to enable an employer to put before the Authority or Court information about its financial position to show it is such that it requires payment of any award to be by instalment. If Mr Butler's interpretation is accepted then an employer must anticipate the possibility of an award being made against it and provide information/evidence to the Authority before, or at, the investigation meeting about its financial position. This will be before liability and quantum have been determined and before the employer usually knows whether, if an award is made, it is one which it can or cannot pay.

[15] If that narrow interpretation is accepted the Authority has no jurisdiction under s 123 (2) to consider any application made for payment by instalment after orders have been made under subsection 123 (1) (b) or (c) of the Act.



[16] I do not accept the narrow literal interpretation relied on by Mr Butler is the correct interpretation of s 123(2). The words in s 123 (2) should be read in the fullest context with a view to giving effect to the purpose of the legislation. A purposive interpretation of s123 (2) that does not prevent an employer making an application to the Authority for payment by instalment after orders have been made against it, is the correct interpretation. I find therefore the Authority has jurisdiction to consider the application.

[17] For completeness the Authority is able to order payment of a monetary sum by instalments when making a compliance order. If the applicant in this case had come to the Authority for an order that there be compliance with the determination then under 138(4A) of the Act the Authority can, if the order relates in whole or part to payment of a sum of money, order payment to the employee by instalments but only if the financial position of the employer requires it. The Authority could also have, if I had found no jurisdiction under s 123 (2), regarded the application by the respondent as a reopening of the investigation to consider whether there should have been an order for payment by the employer by instalment of the orders made under subsection 123 (1) (b) or (c) of the Act.

[18] I find the Authority has jurisdiction to consider the application and if necessary make an order for payment by instalments.

**If the Authority does have jurisdiction then should the Authority make an order for payment by instalment and does the financial position of the respondent require an order be made**

[19] I accept that there are difficulties facing the respondent as a result of declining student numbers in Christchurch. It is trading at a loss. The purchase of the Auckland business and the resulting payment from the trust account for that purpose is a matter that I have had particular regard to. The purchase was finalised after the Authority's investigation meeting but before the determination was issued. It was finalised in the knowledge there was potentially a significant liability with respect to the applicant's claim before the Authority. A sum should have been set aside by the respondent from funds in the Trust Account in the event that there was a liability to be met. There is nothing to support any sum was set aside. That was unwise.



[20] I would have been much more inclined to consider the respondent's application favourably for payment of the orders made under s 123 (1) (b) and (1) (c)(i) and (ii) by instalment if there was evidence that a sum had been set aside from the Trust Account that could be paid immediately to the applicant but it was insufficient. There is no evidence of that prudent step being taken. There are also questions that arise from the financial statements as to whether there was insurance available for some of the losses including the significant loan made to the restaurant business in the CBD.

[22] In conclusion for the above reasons I am not satisfied that the Authority should make an order for payment by instalment of the amount owed by the respondent. For completeness this includes the order made as to costs. The application is declined.



Helen Doyle  
Member of the Employment Relations Authority

