

Determination Number: WA 173/05

File Number: WEA 321/05

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON OFFICE**

BETWEEN	Stephanie Shacham (applicant)
AND	Wright Spa Pools (LH) Limited (respondent)
REPRESENTATIVES	Geoff O'Sullivan for the applicant Michael Gould for the respondent
MEMBER OF THE AUTHORITY	Denis Asher
SUBMISSIONS	11, 18 & 25 October 2005
DETERMINATION	2 November 2005

DETERMINATION OF AUTHORITY: Compliance

Employment Relationship Problem

1. The applicant, Ms Stephanie Shacham, says the Company has failed to comply with Authority determination WA 95/05 (intituled as above), dated 7 June 2005 – statement of problem received on 1 September 2005. She seeks compliance and costs.

2. The Company says it is financially incapable of immediately meeting full payment as ordered by the Authority – statement in reply received on 9 September.
3. I therefore convened a telephone conference of the parties so as to set this matter down for an investigation, etc. As it happened the parties agreed that the Authority should proceed to determine the matter on the papers. A timetable for filing submissions and relevant information was agreed. The parties advised in the conference that they had reached agreement on the previously disputed issue of the quantum of the Company's contribution to Ms Shacham's costs.

Respondent's Position

4. In its statement in reply, the Company says it is financially incapable of immediately meeting in full the payment ordered by the Authority. It says it is trading at a loss and has no funds available to meet the determination. Copies of the Company's profit and loss statement for the four months to 31 July 2005 and a printout of its bank account balances were attached. The Company believes it could sustain payments to the applicant at the rate of \$1,000 per month.
5. Further financial information was tabled by the Company on 11 October.

Applicant's Position

6. At paragraph 27 of the substantive determination the Authority directed the Company to pay to Ms Shacham the sum of \$15,000 compensation for humiliation, etc and two weeks wages. While Ms Shacham has challenged part of the determination, she is not challenging the award of \$15,000 compensation for humiliation, etc.
7. The Company has filed a statement of defence and cross challenge to the applicant's claim but has not applied for or been granted a stay on the proceeding until the outcome of the challenge is decided.
8. Ms Shacham has demanded of the Company that it pay the \$15,000 due to her and, while it has said it would, has failed to do so. No grounds had been advanced by the Company for its failure prior to the filing of an application for compliance. Ms

Shacham therefore seeks compliance under s. 137 (2) of the Act requiring the Company within 5 days of the date of the order or such other date as the Authority thinks fit to pay to her the sum of \$15,000 compensation awarded to her under the determination.

9. In response to the financial information provided by the Company on 11 October counsel for Ms Shacham, Mr Geoffrey O'Sullivan, submits that the Authority should be concerned with the Company's ability to pay rather than a strict reading of the accounts. The Company does not appear to be claiming it is insolvent and thus trading unlawfully, but rather it is unable to pay this debt in full because of other commitments. From its accounts it can be seen that it is paying its other liabilities without demur. The respondent on the income figures presented could raise the funds to meet the amount owed through a loan or could realise some of the \$790,444.94 of total current assets recorded in the balance sheet. Expenses could also be trimmed so as to prioritise the repayment of this debt. The figures reflect trading over a specified period and there is no evidence how expenses compare to sales over the other part of the year. Seasonal aspects of sales may be relevant. It is unclear from the accounts whether the owners receive a salary or wage in addition to any nett profit earned.
10. The Company from its sales figures is clearly an entity of some substance and able if it chooses to meet the amount owed plus costs under the decision.

Discussion

11. Section 180 of the Act provides that an election to challenge an Authority determination does not operate as a stay of proceedings on the determination unless the Court or the Authority so orders. The Company is not asking the Authority to stay its decision. Were that the case it would appear to me the parties' interests would best be met by a direction that, subject to the parties lending themselves to a prompt and efficient hearing of their challenges, the respondent would pay the compensation awarded Ms Shacham into its counsel's interest bearing trust account, by way of suitable, and separate, monthly payments. The monies would then be held in Mr Gould's trust account until the Court's decision on the matter is heard and any appeals arising out of that decision were disposed of.

12. But a stay is not being sought, instead the Company is apparently asking that – under s. 138 (4A) of the amended Act – the Authority order payment to Ms Shacham by way of \$1000 monthly payments. It is seeking an order to that effect as, it says, it is financially incapable of immediately meeting in full the compensation amount awarded by the Authority.
13. Ms Shacham says the financial information advanced by the Company in support of its financial incapability is inadequate: she continues to seek payment in full.
14. This matter is under challenge by both parties in the Employment Court. The Court advises that no date has yet been set down for the hearing.
15. The financial information provided by the Company amounts, I find, to a limited snapshot of its actual trading position. I am persuaded however that there is some merit to its claim of not being able to immediately make payment to the applicant. Under all the circumstances, and by application of s. 138 (4A), I am satisfied it is fair and reasonable to direct the respondent to make 6 monthly payments to the applicant of \$2,500 commencing from no later than 4 weeks from the date of this determination, and proceeding by monthly payments thereafter until the full payment of \$15,000 is made.

Determination

16. The respondent, Wright Spa Pools (LH) Limited, is to pay to the applicant, Ms Stephanie Shacham, 6 payments of \$2,500 (two thousand five hundred dollars) commencing no later than 4 weeks from the date of this determination, and proceeding by monthly payments thereafter until the full payment of \$15,000 is made.
17. Costs are reserved.

Denis Asher
Member of Employment Relations Authority

