

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2014] NZERA Auckland 323  
5444582

BETWEEN                      IRENE SHULRUF  
   Applicant  
  
AND                              YOGHURT SENSATIONS  
   LIMITED  
   Respondent

Member of Authority:      Robin Arthur  
  
Representatives:            Greg Bennett, Advocate for the Applicant  
   Max Whitehead, Advocate for the Respondent  
  
Submissions:                27 and 28 July 2014 from the Applicant and 28 and 29  
   July 2014 from the Respondent  
  
Determination:              30 July 2014

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**SECOND DETERMINATION OF THE AUTHORITY**

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- A.      Yoghurt Sensations Limited (YSL) is declined leave to pay by instalment the remedies it has been ordered to pay Irene Shulruf.**
  
- B.      YSL must also pay Ms Shulruf \$2640.62 as a contribution to her costs of representation.**
  
- C.      The remedies, wage arrears and costs due to Ms Shulruf must be paid by no later than 12 August 2014.**

**Employment relationship problem**

[1]      On 15 July 2014 the Authority ordered Yoghurt Sensations Limited (YSL) to pay Irene Shulruf, within 28 days, wage arrears of \$600 (net), lost wages of \$2472.52 and distress compensation of \$3000.<sup>1</sup> Costs were reserved.

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<sup>1</sup> [2014] NZERA Auckland 307.

[2] YSL then sought leave to pay the sums ordered to Ms Shulruf by instalments. Ms Shulruf sought an order for costs. I considered submissions on both issues from both parties before making the orders set out at the head of this determination. I have stated below relevant information and submissions from the parties and my reasons for the orders made.

### **Application on instalments**

[3] YSL sought leave to pay the wages and compensation now owed to Ms Shulruf by three instalments in August, September and October. It was, in effect, an application to vary the orders made in the Authority's 15 July determination. YSL's reason for the request was that its Queen Street store – where Ms Shulruf had worked until it was closed in late November 2013 – had run at a loss but YSL was still paying rent on those premises due to its lease arrangements.

[4] The Employment Relations Act 2000 (the Act) refers to two circumstances in which the Authority may, where the employer's financial position requires it, order payments due to a worker be made by instalment: wages arrears orders and compliance orders.<sup>2</sup> Just \$600 of the total value of the orders made (\$6072.52) relate to wage arrears but I considered the standard used for decisions on such instalments was the appropriate one to apply to YSL's application: did the employer's financial position *require* it? The test, in short, is necessity.

[5] In the Authority's earlier investigation meeting – that resulted in Ms Shulruf succeeding in her claim and being awarded lost wages, compensation and wage arrears – YSL had not sought any instalment plan if it were ordered to pay remedies. At that meeting its operations manager Hemant Malik gave evidence that the business group, of which YSL was a part, operated other stores. Some sold frozen yoghurt under the Yogorino brand (including one at the St Lukes mall) while others – under two different brand names – sold Indian food and Mexican food.

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<sup>2</sup> Sections 131(1A) and 138(4A) of the Act.

[6] There was no information that YSL and its wider business group lacked cash flow from those other stores or access to credit facilities such that it would not be able to meet its obligations to make the payments to Ms Shulruf within the ordered timeframe. Accordingly, while YSL may have *desired* instalment payments, I was not satisfied that its financial position *required* them.

### **Costs**

[7] Ms Shulruf sought an order for costs of \$3869.06 – comprising a discounted fee of \$369.06 to her first legal advisor and then \$3500 for her costs of representation at the Authority investigation meeting.

[8] I indicated in the earlier determination that I anticipated assessing an order for costs to Ms Shulruf on the basis of that Authority's usual daily tariff applied to a half-day meeting – that is \$1750 – adjusted if necessary for the factors and principles identified in *PBO v Da Cruz*.<sup>3</sup>

[9] Ms Shulruf wanted a higher costs award because attending the investigation meeting for her, one witness and her representative effectively spanned an entire day. This occurred because YSL did not attend the investigation meeting at the notified time of 10am. After being contacted by the Authority on that morning, arrangements were made to start the meeting at 12.30pm. The meeting then continued until 5pm. As a result Ms Shulruf and one other witness were said to have been put to further expense because they could not attend work during the latter part of the day and her advocate was unable to work on any other matter that day.

[10] I have not accepted the alleged consequences should increase a costs award to a full daily tariff but have agreed a small uplift was appropriate for YSL's lateness. Mr Whitehead said it occurred because he appeared to have overlooked the investigation meeting notice. I also considered some of the time taken during the meeting – which could have been shorter – was due to part of the material in support of Ms Shulruf's wage arrears claim not having been provided by her to the Authority in full and in advance. A modest allowance should also be made for the costs of Ms

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<sup>3</sup> [2005] 1 ERNZ 808.

Shulruf having to respond on the question of YSL's request to pay the remedies by instalment.

[11] On that basis I decided a total award of costs of \$2640.62 was appropriate – comprising the \$369.06 fee of her first representative and the remainder in respect of representation at the investigation meeting (and responding on the instalment issue). Reimbursement of the \$71.56 fee paid to lodge her claim in the Authority is also included in that amount.

[12] I did not take any account of an additional submission by Ms Shulruf for increased costs – to the effect that YSL knew it was wrong about the substantive issues determined earlier by the Authority. That was simply the 'event' of success which resulted in eligibility for costs rather than being a factor in increasing them.

[13] As a result of this determination the remedies due to Ms Shulruf should be paid within the timespan ordered in the Authority's earlier determination – that is be no later than 12 August 2014. I have also ordered costs be paid by that time.

[14] I also arranged for a certificate of determination to be issued with this determination.

Robin Arthur  
Member of the Employment Relations Authority