

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
CHRISTCHURCH**

[2012] NZERA Christchurch 85  
5325765

BETWEEN

LAUREN SMITH  
Applicant

A N D

MUNCHIES ON MARSDEN  
LIMITED  
Respondent

Member of Authority: Helen Doyle

Representatives: Shannon Hollis, Counsel for Applicant  
Robyn Scott, Advocate for Respondent

Application Received: 20 April 2012

Memorandum in  
Opposition Received: 1 May 2012

Date of Determination: 7 May 2012

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**APPLICATION FOR ORDER FOR PAYMENT BY INSTALMENTS UNDER  
S.123(2) EMPLOYMENT RELATIONS ACT 2000**

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[1] In my determination dated 13 April 2012 I found the applicant had a personal grievance and awarded the sum of \$1,123.20 gross being lost wages and \$7,000 being compensation for humiliation and loss of dignity. Costs were reserved and a timetable set for submissions.

[2] Before the due date for costs submissions to be lodged and served a Director of the respondent company Robyn Scott lodged an application for an order for payment of the sums awarded by instalments under s.123(2) of Employment Relations Act 2000.

[3] In her application Ms Scott advised that the company was not in a position to make payment of the monies awarded in a lump sum and attached the company's

financial statements for the years ending 31 March 2010 and 31 March 2011. Both years show losses.

[4] The financial statements for the year ending 31 March 2012 were not available at the time the company made the application, however Ms Scott advised that the company accountants had been asked to prepare the accounts as soon as possible. For some up to date information Ms Scott enclosed a copy of the bank statement for the company for March 2012 showing a debit closing balance.

[5] Ms Hollis lodged a memorandum of counsel opposing the application by the respondent. Ms Hollis opposed the application on the following basis:

- It would take an exorbitant amount of time, eight years, to make payment of the full award;
- As the business is running at a loss there is a significant risk that the respondent company would simply wind itself up so as to avoid existing creditors and re-establish a new company thereby successfully avoiding existing liability including the award made in favour of the applicant;
- The applicant disputes the reliability of the financial statements given there is no till tape in the till and wages are paid from till takings and some invoices are paid from till takings.

[6] Ms Hollis advised that it was the applicant's intention to use measures provided by the District Court for the enforcement of the determination.

[7] Whilst the financial statements for the year ended 31 March 2012 are not available there has been some urgency in determining this matter as Ms Scott has received advise that a bailiff is intending to enforce an application for a distress warrant this week.

### **Determination**

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

*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.*

[9] There are two matters for the Authority to consider in whether or not to make the order requested. The first matter is whether the financial position of the respondent company requires an order for payment by instalment. The second is whether an order should be made with respect to payment of the awards for reimbursement of wages and for payment of compensation to the applicant by instalments of \$20 per week.

[10] The Authority in this case has not had the benefit of the end of year financial statements for 2012. The information provided would support that it is likely the financial statements will again show a loss. The company does have some fixed assets by way of plant and equipment and current assets including stock on hand. The liabilities in the financial statement for end of year 2011 exceed the total assets. The financial position of the company is such that payment of the amount awarded in one lump sum would in all likelihood involve borrowing money and therefore increasing the company's liabilities.

[11] The Authority, given the known financial position for the year ending 31 March 2011, would in all likelihood conclude the financial position of the respondent requires payment by instalments. The only proposal before the Authority for payment by the respondent by instalment is for \$20 per week. The proposal to pay \$20 per week would mean that the applicant would not receive full payment for about eight years or even longer given that costs are yet to be determined. That would place the applicant in an inferior position to other creditors of the respondent and prevent her being able to take steps to enforce the successful determination in the usual way as she is entitled to do.

[12] In the circumstances the Authority declines to make the order sought by the respondent for payment to the applicant of \$20 per week.

Helen Doyle  
Member of the Employment Relations Authority