

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 246
5457846

BETWEEN

WHALE PUMPS LIMITED t/a
DENBY CATERERS
Applicant

A N D

SHIRLEY ANNE
MacDONALD
Respondent

Member of Authority: James Crichton

Representatives: Chris Rowe, Advocate for the Applicant
Cor Eckard, Counsel for the Respondent

Investigation Meeting: On the papers

Date of Determination: 18 June 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant company (Denby Caterers) seeks compliance with a costs determination of the Authority dated 28 August 2013 and issued as [2013] NZERA Auckland 387.

[2] Put simply, the Authority's costs determination awarded Denby Caterers the sum of \$2,000 as a contribution to its reasonably incurred costs in defending a claim by Ms MacDonald, but because I was persuaded of Ms MacDonald's financial circumstances, I allowed Ms MacDonald time to pay that sum. I note that in reaching the decision I did on the quantum of costs, I had discounted the total amount that would ordinarily have been awarded because of an acceptance of Ms MacDonald's financial predicament.

[3] The application for compliance comes to the Authority now as a consequence of Ms MacDonald's failure to make any payment in reduction of the total amount ordered, at least up until the point when the present proceedings were filed in the Authority.

[4] I convened a telephone conference with the parties' representatives and as a consequence of that, they helpfully agreed that this matter could be dealt with on the papers. They also accepted my suggestion that they could usefully provide me with some additional material which would assist me in dealing with this matter. That material has now come to hand and comprises from the applicant Denby Caterers, a clear statement of its various attempts to obtain payment from Ms MacDonald since the Authority's costs determination issued, and from Ms MacDonald herself, a statement of assets and liabilities.

The applicant's position

[5] Ms Rowe for the applicant has helpfully detailed the steps taken by Denby Caterers to obtain payment of the judgment sum. First, there were discussions between the parties' representatives after the substantive matter had been decided by me with a view to settling costs by agreement and those discussions came to nothing. As a consequence an application was made to the Authority for costs to be fixed and that resulted in the subject costs determination.

[6] Contemporaneously with the issue of the Authority's costs determination, Ms MacDonald caused a challenge to the Authority's substantive determination to be filed in the Employment Court and her then advocate erroneously argued that the effect of the challenge operated as a stay to the Authority's earlier determination.

[7] Then Ms MacDonald changed her representative to Mr Eckard and there were further regular attempts by Denby Caterers to obtain some payment from Ms MacDonald. Settlement discussions took place between the parties on 31 January 2014 and I am advised that the outstanding costs award was discussed during that meeting but without result.

[8] Then, in response to Denby Caterers's application for a compliance order in the present proceeding, Ms MacDonald offered to pay \$10 per fortnight but did not provide any evidence of her financial position.

[9] Denby Caterers saw they were insulted by that proposal and as Ms Rowe made clear to me during my telephone conference with the parties' representatives, Denby Caterers was seeking \$100 per fortnight by automatic payment in reduction of the judgment sum.

[10] Also as part of my telephone conference with the parties, there was an agreement that Mr Eckard would seek to facilitate an immediate automatic payment of \$10 per fortnight from his client as a sign of good faith pending the determination of the matter presently before the Authority for compliance. Ms Rowe tells me that she has provided Mr Eckard with the details of the bank account to which that money is to be credited.

The respondent's position

[11] As promised, Mr Eckard has filed an affidavit of means in the Authority which sets out Ms MacDonald's personal financial position.

[12] I am satisfied that the affidavit discloses that Ms MacDonald receives a monthly income of \$836 (the unemployment benefit) and that her monthly outgoings are \$653.07. That would appear to leave a surplus each month of a little over \$182. Ms MacDonald makes the point, understandably, that she needs some of that surplus for extraordinary expenditure which is unbudgeted.

[13] It is also clear from Ms MacDonald's statement that the only debt she has save for current liabilities, is her judgment debt to Denby Caterers.

[14] Ms MacDonald indicates that she is not able to make the payment requested by Denby Caterers of \$100 per fortnight, at least at the moment. She is, however, able to make a payment of \$100 per month in reduction of the judgment debt.

[15] Moreover, once she becomes eligible for Guaranteed Retirement Income when she turns 65 on 25 August 2014, she will be able to make payments of \$100 per fortnight.

Determination

[16] I am satisfied there is little point in making orders that are not capable of being implemented. However, I must also say that it is disappointing that Ms MacDonald has taken so long to address her obligations in this matter. I accept this may be

because of a misconception about the effect of her challenge to my decision in the Employment Court. That said, all parties need to understand when they undertake litigation, including in the Authority, there is the attendant risk that if they are unsuccessful they will be called upon to meet a contribution to the costs of the successful party. That is what happened in this case and it is discouraging that the Authority is still having to deal with the matter some many months after the decision was taken.

[17] I must, however, pay tribute to both of the representatives now engaged in this matter. Ms Rowe is acting pro bono for her client and she is to be commended for that very honourable stance. Mr Eckard, since he took over responsibility for Ms MacDonald's legal affairs, has been unfailingly professional, making concessions where they are due and doing everything in his power to facilitate a resolution of the matter in a practical way. I commend both representatives accordingly.

[18] Given the information before me, I think the only practical course is for me to order compliance with the Authority's costs determination dated 28 August 2013 on the following basis:

- (a) Ms MacDonald is to make reductions in the judgment debt now totalling \$2,071.56, incorporating as I now direct the costs of the Authority's filing fee in the instant application, at the rate of \$100 per month by automatic payment; and
- (b) Those payments are to continue without amendment or deduction until receipt by Ms MacDonald of her Guaranteed Retirement Income payments due on and from her 65th birthday on 25 August 2014; and
- (c) Ms MacDonald is to take all appropriate steps to ensure that the documentation required by Work & Income New Zealand for the payment of her superannuation are met; and
- (d) On and from receipt of her Guaranteed Retirement Income payments due with effect from 25 August 2014, Ms MacDonald is to amend her automatic payment authority from \$100 per month to \$100 per fortnight; and

- (e) That new automatic payment is to remain in force until the total indebtedness of \$2,071.56 has been extinguished in full.

[19] Leave is reserved for Denby Caterers to revert to the Authority in the event of default.

James Crichton
Member of the Employment Relations Authority