

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

**I TE RATONGA AHUMANA TAIMAHI  
TE WHANGANUI-Ā-TARA ROHE**

[2021] NZERA 472  
3087032

BETWEEN JENNIFER CHRISTALL  
Applicant

AND KLJ LIMITED  
First Respondent

AND KERRY BARTON  
Second Respondent

Member of Authority: Michele Ryan

Representatives: Robert Morgan, advocate for the Applicant  
Simon F Gaines, counsel for the Respondent

Investigation Meeting On the papers

Submissions and Information received 2 April 2020 and 7 May 2020 from the Applicant  
23 April 2020 and 1 and 3 October 2021 from the Respondent

Date: 27 October 2021

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**DETERMINATION OF THE AUTHORITY**

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**Employment Relationship Problem**

[1] In a determination issued on 25 November 2019, the Authority ordered the respondent, KLJ Limited (“KLJ” or “the company”) to pay its former employee, Ms Jenny Christall:

- \$148,563.62 (gross) in unpaid wages, where Ms Christall had not received minimum wage for all hours worked over a period of almost 4½ years;
- \$24,116.69 (gross) as reimbursement of her outstanding holiday pay entitlement, and to paid public holidays;
- \$18,000 (without deduction) as compensation for the distress associated with Ms Christall’s unjustified dismissal; and

- \$1,125 as a contribution to Ms Cristall’s costs, plus \$71.56 for the filing fee.<sup>1</sup>

[2] Despite several written requests by Ms Christall’s representative to KLJ for payment, including an initial suggestion that Ms Christall was open to the possibility that the debt be paid by instalment payments, KLJ has not made any of the payments ordered, nor has it challenged the Authority’s determination.

### ***Ms Christall claims***

[3] Ms Christall now seeks orders under s 137(1) of the Employment Relations Act 2000 (the Act) to have KLJ comply with the orders contained in the Authority’s 2019 determination.

[4] Ms Christall also seeks a “*compliance order naming Kerry Barton ... being the sole Director of KLJ Limited, as guided by s 142W of the ...Act.*”

[5] I shall return to both these matters.

### **Preliminary matters**

#### ***Jurisdiction***

[6] In its statement in reply KLJ asserted Authority did not have the jurisdiction to make the order Ms Christall seeks. It is mistaken on this point. The Act at s 137 empowers the Authority to order compliance with a determination as follows:

#### **137 Power of Authority to order compliance**

- (1) This section applies where any person has not observed or complied with—
    - (a) ...
    - (b) any order, determination, direction, or requirement made or given under this Act by the Authority, or a member or an office of the Authority....
  - (2) Where this section applies, the Authority may, ... by order require, ... with any matter before the Authority ... to which that person is a party, that person to do any specified thing ..., for the purpose of preventing further non-observance of or non-compliance with the provision, order, determination, direction, or requirement.
- ...

[7] Section 138 provides additional powers to the Authority (when ordering compliance), including if the order relates to the payment of a sum of money, the Authority has a discretion to order payments to be made by instalment but only if “*the financial position of the employer*

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<sup>1</sup> *Christall v KLJ Limited* [2019] NZERA 674 (the 25 November 2019 determination)

*requires it*". Previous determinations of the Authority have concluded s 138(4A) sets a high threshold before the Authority should exercise its discretion to order payment by instalments.<sup>2</sup>

### ***Non publication order***

[8] Setting aside the jurisdictional issue, during a case management call counsel for KLJ advised that, in any event, the company was not able to pay the sums ordered in the 25 November 2019 determination.

[9] The Authority directed KLJ to provide a sworn affidavit setting out KLJ's position alongside any relevant documentation if it was seeking to establish impecuniosity as reason for its failure to pay the amounts awarded by the Authority.

[10] Financial statements concerning KLJ for the years ending 31<sup>st</sup> March 2018, 2019, and 2021 were subsequently been furnished to Authority. Mr Barton provided a written statement (although this was not sworn or affirmed) and some accompanying documents regarding KLJ's operations.

[11] Publication of the information contained in the financial statements is limited to only those matters disclosed in this determination that is required to make reasoned findings. All other information contained in the financial statements is subject to a non-publication order.<sup>3</sup>

### ***The Authority's investigation***

[12] The parties agreed to have the claims KLJ determined on the papers. This determination has been issued outside the timeframe set out at s 174C(3)(b) Employment Relations Act (the Act). The Chief of the Authority has decided exceptional circumstances existed as providing cause for the delay.<sup>4</sup>

### **Are there grounds to issue a compliance order against KLJ?**

[13] There is no dispute KLJ has not paid the sums ordered in the November 2019 determination.

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<sup>2</sup> For example: *Sinclair v Datum Connect Ltd* [2014] NZERA Auckland 463;

<sup>3</sup> Employment Relations Act 2000, Schedule 2, clause 10.

<sup>4</sup> Employment Relations Act 2000, s 174C(4).

[14] KLJ does not seek to have an order that allows it to pay the debt it owes to Ms Christall by periodic instalment payments over time. Rather, it is said the company does not have the financial resources to comply with a compliance order, either now or in the foreseeable future. In these circumstances its say a compliance order will not serve the interests of justice.

[15] Ms Christall does not accept KLJ's assertions. She refers to significant construction and building extensions that have occurred at the hotel since her dismissal.

[16] In his written statement Mr Barton reports that KLJ sold its land and building to a third party in March 2018. KLJ now operates the hotel under a lease arrangement, and is not responsible for the renovations Ms Christall refers to.

[17] As to the profit from the sale, Mr Barton says after discharging the mortgage KJL was left with \$678,520. He says:

- (a) \$197,000 was retained by the purchaser whilst repair work was undertaken;
- (b) \$200,000 was allocated to maintenance and refurbishment over two years;
- (c) \$60,000 was lent to Mr Barton's son, and
- (d) the remainder was spent on a car and family requirements.

[18] In each of these instances the sums referred to remain part of KLJ's capital. For example:

- The retainer held by the purchaser must be returned to KLJ once the work is concluded. This sum alone would meet KLJ's liability to Ms Christall.
- The loan and monies recorded at (c) and (d) respectively are not KLJ's debts and those funds could be recalled to pay the debt.

[19] Similarly the shareholders' account reflects Mr Barton owing, as at 31 March 2021, the sum of \$289,725 to the company. That sum, in and of itself, would more than satisfy the compliance order sought by Ms Christall.

[20] Finally, I note KLJ's Statement of Financial Position for the year ending 31 March 2021 records KLJ has positive net assets that equate to over twice the sum owed to Ms Christall.

[21] An email received 3 October 2021 discloses some further financial information but does not alter the conclusions made on this issue.

[22] It follows from the above appraisal that I am not persuaded KLJ cannot give effect to a compliance order. It is difficult not to form an impression that KLJ has funds which it should be able to access to pay Ms Christall if it chose to do so. It is unclear why it has not. If it is because KLJ does not accept the liability and does not wish to pay it, that is a separate issue to whether it has the means to do so, which I have concluded it does.

[23] KLJ is ordered to comply with the orders made in the 25 November 2019 determination and pay Ms Christall the total sum of \$191,876.87. This sum must be paid on or by 23 November 2021 being within 28 days of the date in which this determination was issued.

### **Does Mr Barton as KLJ's director have any liability?**

[24] The ability to recover wages from a person who is not the employee's employer is available under s 142Y of the Act, but there are limits to the provision. Firstly there must have been a default in the payment of minimum wages and entitlements (also known as employment standards<sup>5</sup>), as has occurred in the circumstances of this matter. A "*person involved in the breach*" as defined by s 142W, may, subject to the requirements at ss (1) of the provision, include a person occupying the position of a director of an employing company, such as Mr Barton in this instance.

[25] At this juncture I am unable to order Mr Barton to pay Ms Christall the quantum of minimum entitlements owed. However, to the extent KLJ is unable to, or does not, comply with the order made against it (above at [19]) within the time frame specified, leave is granted to Ms Christall to return to the Authority to establish the test at s 142W(1) if she seeks to have the liability for minimum entitlements transferred to Mr Barton.

### **Summary of findings**

[26] KLJ Limited is liable for the sums ordered in the 25 November 2019 determination and:

- (a) KLJ is ordered to pay Ms Christall the total sum of \$191,876.87.
- (b) Payment of the sum recorded at (a) must occur on or before 23 November 2021.

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<sup>5</sup> Employment Relations Act 2000, defined at s 5

- (c) Should KLJ fail to comply with (a) and (b), the Authority has granted Ms Christall leave to seek an order to transfer the liability to Mr Barton if the test at s 142W is met.

**Costs**

[27] Costs are reserved.

Michele Ryan  
Member of the Employment Relations Authority