

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2015] NZERA Wellington 85
5564164

BETWEEN YVETTE CATHERINE POTTS
Applicant

AND COLLINGWOOD PLUMBING
LIMITED
Respondent

Member of Authority: Michele Ryan

Representatives: Applicant in person
No attendance by or on behalf of the Respondent

Investigation Meeting: 1 September 2015

Oral determination: 1 September 2015

Written determination: 2 September 2015

ORAL DETERMINATION OF THE AUTHORITY

This determination is a written record of an oral determination delivered on 1 September 2015.

Employment relationship problem

[1] Ms Yvette Potts claims Collingwood Plumbing Limited (CPL) is in breach of a Record of Settlement signed by the parties on 17 April 2015 and certified by a mediator employed by the Ministry of Business, Innovation and Employment (MBIE) on the same date.¹ She requests CPL comply with clause 2 of the Record of Settlement.

[2] Although the Record of Settlement contains a confidentiality provision it is necessary to set out clause 2 to determine whether enforcement action is required, as follows:

¹ Pursuant to s.149 of the Employment Relations Act

The respondent shall pay the applicant all holiday pay pursuant to the Holidays Act 2003 as calculated and agreed to be \$2,451.20 (gross). This sum shall be paid in two instalments of \$1,225.60 with the first instalment to be deposited by direct credit 17 May 2015 and the remaining instalment to be paid 17 June 2015.

[3] Ms Potts says two deposits of \$500 each have been placed by CPL into her bank account,² but that she has not received the remainder of the sum agreed as owed.

The investigation

[4] Mr Richard Collingwood is the sole director of CPL. He lodged a reply to Ms Potts' application on behalf of CPL but was not present for a case management call on 19 August. A Notice of Investigation was sent to each of the parties on 20 August 2015.

[5] At 5.31pm on 31 August 2015 Mr Collingwood advised the Authority by email that he would not be attending the investigation meeting scheduled to begin at 10am on 1 September 2015. No corresponding reason to explain the absence was provided. Without good cause for his non-attendance or representation I decided to proceed with the investigation meeting.³

Relevant information

[6] CPL's statement in reply advised it is in significant financial difficulty and unable to immediately pay Ms Potts according to the Record of Settlement. Mr Collingwood proposed to have CPL pay \$50 per week by way of an automatic weekly payment until the company becomes "*more financial*".

[7] Against that proposition Ms Potts says she is aware that CPL has some undisclosed loans. She considers these are likely to be prioritised over any future imposed instalment payment plan that the Authority may order. The inference I understand Ms Potts wishes me to draw is that if an order for payment by way of instalment is made she is unlikely to receive those monies.

² on 19 May and 22 June 2015 respectively

³ cl. 12 of Schedule 2 of the Employment Relations Act

The issue and discussion

[8] There is no real dispute that Ms Potts is owed \$1451.20⁴ pursuant to the Record of Settlement. At issue is whether an order for immediate compliance should be made or whether CPL should be ordered to meet the debt by instalment payments.

[9] Section 138(4A) of the Act provides that the Authority may order compliance, in respect to payment of a sum of money to an employee, by ordering payment by instalments “*but only if the financial position of the employer requires it*”. Determinations by the Authority have previously observed that s 138(4A) sets a high threshold for the exercise of the Authority's discretion to order payment by instalments.⁵

[10] CPL attached several documents to its statement in reply in support of assertions that it is impecunious, including a bank statement for the period between February and 16 April 2015 and information about Mr Collingwood's personal circumstances. That documentation was not certified, sworn or affirmed as true and correct and not able to be tested. The information reflects CPL's financial situation on 16 April 2015 and prior to the execution of the Record of Settlement was strained.

[11] No additional information to demonstrate whether CPL's financial position has improved or worsened in the ensuing 4 ½ months was supplied. I note there is nothing recorded on the Companies Office Register to indicate CPL is no longer trading or is insolvent.

[12] Mr Collingwood's absence from the investigation meeting coupled with outdated information means I am unable to reliably assess whether CPL's financial position as at 1 September 2015 requires an order for instalment payments. In this situation I decline to make an order to this effect.

Orders and costs

[13] Pursuant to s. 151(2) and s.137 of the Employment Relations Act Collingwood Plumbing Limited is ordered to comply with clause 2 of the Record of Settlement. In

⁴ This sum is calculated as 874.08 (nett) following PAYE and KiwiSaver contributions

⁵ For example: *Sinclair v Datum Connect Ltd* [2014] NZERA Auckland 463; *Stein v Garrard's (NZ) Ltd* ERA Auckland AA287/08

particular it must pay Ms Potts the outstanding sum of \$1451.20 (gross).⁶ This sum must be paid within 21 days of this determination.

[14] Costs are not at issue. Ms Potts was self-represented. I further order CPL to reimburse Ms Potts the sum of \$71.56 – the cost of filing her application with the Authority.

Michele Ryan
Member of the Employment Relations Authority

⁶ This sum is calculated as 874.08 (nett) following PAYE and KiwiSaver contributions