

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2016] NZERA Wellington 97
5600734

BETWEEN

JOANNA POWELL
Applicant

AND

TRICKLEBANK PLUMBING
2010 LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Kelly Colley, Advocate for Applicant
No appearance for Respondent

Investigation Meeting: 12 August 2016 at Palmerston North

Submissions Received: At the investigation meeting

Determination: 12 August 2016

**ORAL DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

[1] The applicant, Joanna Powell, seeks an order the respondent, Tricklebank Plumbing 2010 Limited (Tricklebank), comply with various provisions contained in a section 149 agreement the parties concluded on 11 November 2015. She also asks a penalty be imposed for the alleged non-compliance and seeks reimbursement of her costs.

[2] Tricklebank's position is unknown as it neither provided a statement in reply nor attended the investigation meeting. Tricklebank's absence does, however, raise the question of whether or not I should proceed in its absence.

[3] The answer is yes. All companies are required to have an address for service.¹ Tricklebank's is the offices of Finman Services Paraparaumu Limited, 44 Ihakara Street, Paraparaumu. The Notice of Investigation Meeting was served on that address

¹ Section 192(1) of the Companies Act 1993

and receipt was acknowledged by signature. While that would be sufficient Ms Colley also took the precaution of arranging personal service and a further copy was sent to Tricklebank's advertised e-mail address. I am satisfied notice of the investigation meeting has been properly served.

[4] The notice of meeting includes advice that should the respondent fail to attend the Authority may proceed and issue a determination in favour of the applicant.² I am therefore satisfied Tricklebank is, or at least should be, aware of the consequences of non-attendance yet chose not to attend.

[5] In the circumstances and given the absence of either notice of, or an explanation for, Tricklebank's absence I consider it appropriate to continue.

[6] On 11 November 2015, and having attended mediation the previous day, the parties entered into an agreement signed by the mediator pursuant to s 149 of the Employment Relations Act 2000 (the Act).

[7] Amidst other things the settlement required Tricklebank:

- a. Pay Ms Powell all holiday pay entitlements due in accordance with the Holidays Act 2003 with such payment including *reimbursement* of 11 hours annual leave; and
- b. Pay Ms Powell \$4,000 as compensation pursuant to s 123(1)(c)(i) of the Act; and
- c. Pay Ms Powell the residual amount owing under a profit share scheme contained within her employment agreement; and
- d. Provide a written certificate of service; and
- e. Pay a contribution toward Ms Powell's costs of \$500 plus GST.

[8] The first two payments and the certificate of service were to be provided no later than 17 November 2015 and the contribution toward costs was to be made within 7 days of receipt of an invoice from Ms Coley. The invoice was sent on 18 November 2015.

² Note 2 to Form 8 of the Employment Relations Authority Regulations 2000

[9] The profit share was to be calculated on earnings for the twelve months to date of settlement (11 November 2015) and paid no later than 22 December 2015. A *comprehensive breakdown* of how it was calculated was also to be provided by 22 December 2015. Ms Powell has been forced to estimate the value of this provision having been unable to access Tricklebank's books. She has produced what appears to be a very conservative estimate of this provisions worth - \$12,800. I accept her estimate.

[10] Ms Powell asserts none of the actions required of Tricklebank have occurred. I have had the ability to question Ms Powell and accept her assertions. It follows I accept Tricklebank has failed to comply with its obligations and an order it do so will follow.³

[11] Ms Powell also asks Tricklebank be penalised for its failure to comply with its obligations under the settlement. That the ability to do so exists is confirmed by section 149(4) of the Act. Having heard Ms Powell and Ms Coley and in the absence of any contrary argument or evidence I conclude this is a flagrant breach which warrants the imposition of a penalty. There has been no attempt by Tricklebank to address the issue or respond to approaches from either Ms Powell or the Authority.

[12] I consider \$2,500 to be appropriate.

[13] Ms Powell also seeks costs. She does so on an indemnity basis. Her costs total \$1,282.51. This includes the filing fee, the cost of the document server and GST.

[14] An award of indemnity costs is unusual but in this case I consider it appropriate. Once a party enters into a settlement agreement it should comply and Ms Powell should not have to incur the expense of this application. To that I add the fact Ms Powell told Tricklebank she would seek indemnity costs if forced to come to the Authority to address its failure to comply with the settlement.

Conclusion and Orders

[15] For the above reasons I conclude the orders sought by Ms Powell should be made.

[16] As a result I order that:

³ Section 137(1)(a)(iii) of the Employment Relations Act 2000

- a. The respondent, Tricklebank Plumbing 2010 Limited, comply with the terms of the s 149 settlement it entered into on 11 November 2015 and that it:
 - i. Pay Ms Powell all holiday pay entitlements due in accordance with the Holidays Act 2003 with such payment including *reimbursement* of 11 hours annual leave; and
 - ii. Pay Ms Powell \$4,000 as compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
 - iii. Pay Ms Powell \$12,800 (twelve thousand, eight hundred dollars) being the residual amount owing under the profit share scheme; and
 - iv. Provide Ms Powell with a written certificate of service; and
 - v. Pay Ms Coley a contribution toward Ms Powell's costs of \$500 plus GST.
- b. Pay a penalty to the Crown of \$2,500 (two thousand, five hundred dollars). Payment is to be made to the Crown via the Authority;
- c. Pay Ms Powell a further \$1,282.51 (one thousand, two hundred and eighty two dollars and fifty one cents) as reimbursement of the costs incurred in making this application.

[17] Tricklebank is comply with the orders in paragraph [16] no later than 4.00pm on Friday 26 August 2016.

[18] In closing I caution the respondent and its directors, Lois and Michael Kunac, that failure to comply with the above orders may result in further consequences. Should such a failure be pursued in the Employment Court⁴ potential consequences include the imposition of fines, the sequestration of property and/or imprisonment.

⁴ Sections 139 and 140 of the Employment Relations Act 2000

Conversely, and perhaps more effectively, a certificate of determination may be sourced from the Authority and the matter pursued in the District Court.⁵

M B Loftus
Member of the Employment Relations Authority

⁵ *Denyer v Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre* [2015] NZEmpC41 at [42] and *Broeks v Ross* EmpC Auckland AC36A/09, 11 November 2009 at [5]