

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

[2014] NZERA Auckland 258
5455127

BETWEEN EMMA TIMBERLAKE
Applicant

A N D AUCKLAND RING
COMPANY LIMITED
Respondent

Member of Authority: Rachel Larmer

Representatives: Larry Timberlake, Father of Applicant
John Duggan, former director of Respondent

Investigation Meeting: 04 June 2014 at Auckland

Additional Evidence: 13 June 2014 from Mr Duggan
20 June 2014 from Applicant

Date of Determination: 25 June 2014

DETERMINATION OF THE AUTHORITY

A. Ms Timberlake's application for a compliance order is declined.

Employment relationship problem

[1] Ms Timberlake was employed by the Auckland Ring Company Limited (Auckland Ring Co) to work in its Ponsonby jewellery shop. She filed a personal grievance claim against Auckland Ring Co which was set down for an Authority investigation meeting on 18 October 2013. On the day of the Authority's investigation the parties asked Member Tetitaha to issue a consent determination, which she did.¹

[2] There is no dispute that Auckland Ring Co has not taken any steps to comply with its obligations in respect of the agreed terms of settlement, which are confidential

¹ [2013] NZERA Auckland 480

to the parties. Mr John Duggan, Chartered Accountant, and director of Duggan and Co Limited, Chartered Accountants, was the director of Auckland Ring Co at the material times. Mr Duggan's accountancy firm also provides accountancy services to Auckland Ring Co.

[3] On 31 March 2014 Ms Timberlake applied to the Authority seeking a compliance order with the Authority's consent determination dated 18 October 2013.

[4] Mr Duggan was witness summonsed to attend the Authority's investigation meeting with relevant documentation because it was not provided voluntarily in advance of the Authority's investigation meeting.

[5] Mr Duggan provided information at the investigation meeting on 04 June 2014 about Auckland Ring Co's financial position for the first time. At Ms Timberlake's request, the Authority adjourned its investigation meeting to give her time to consider the financial information Mr Duggan had filed and to take advice.

[6] Mr Duggan was also directed to file an affidavit regarding the Auckland Ring Co's financial situation as the full picture was not available at the investigation meeting on 04 June.

[7] Mr Duggan's affidavit confirms that Auckland Ring Co ceased trading on 14 December 2013 and that its Ponsonby Road shop was closed on that date. Auckland Ring Co sold stock to Webbs Auctions on 28 February 2014 and it provided additional stock by way of trade to its builder who was owed in excess of \$12,000 and to the landlord who was owed in excess of \$9,000. It also appears to have paid its then employees their employment entitlements. It is clear that Auckland Ring Co has a number of creditors and no assets.

[8] Mr Duggan acknowledges that Auckland Ring Co made no attempt to communicate with Ms Timberlake about its financial situation or its obligations under the consent determination that had been issued in October 2013. Unlike other creditors she appears to have been unaware of Auckland Ring Co's plans to close its shop and cease trading or the steps it was taking to sell or trade its stock.

[9] Ms Timberlake seeks a compliance order. It is clear Auckland Ring Co has failed to take any steps at all to comply with the obligations it agreed to enter into as per the consent determination.

[10] However, it is not enough for Ms Timberlake to merely establish non-compliance with the Authority's consent determination. The Authority is required to exercise its discretion in a principled manner regarding the making or declining of a compliance order. This discretion must be carried out in accordance with the general principles which govern the exercise of discretions.

[11] I consider this is a case in which there would be no practical benefit in the Authority issuing a compliance order. The Auckland Ring Co does not have any ability to raise funds as it has large debts and no assets. Mr Duggan's evidence is that there was no prospect of further funds being injected into the company by the shareholders and owners.

[12] I consider this is a situation where compliance appears to be unlikely if not impossible in view of Auckland Ring Co's financial position. For this reason I consider it undesirable to exercise the Authority's discretion in favour of making a compliance order. Serious consequences arise from the failure to observe a compliance order, so I do not consider it appropriate to exercise the discretion to order compliance where there is no realistic prospect of the compliance occurring.

[13] Accordingly Ms Timberlake's application for a compliance order does not succeed so is dismissed. Neither party were represented so there is no issue as to costs. Because Ms Timberlake's application has not succeeded she is not entitled to be reimbursed for her filing fee.

Rachel Larmer
Member of the Employment Relations Authority