

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2017] NZERA Wellington 131
3019531

BETWEEN

VICKI MADDOCK
Applicant

AND

LEE EUROPEAN LIMITED
Respondent

Member of Authority: M B Loftus

Representatives: Timothy Hesketh, Counsel for Applicant
No appearance for Respondent

Investigation Meeting: 13 December 2017 at Palmerston North

Submissions Received: At the investigation meeting

Determination Delivered: 13 December 2017

Written Record of Oral
Determination: 14 December 2017

**ORAL DETERMINATION OF
THE EMPLOYMENT RELATIONS AUTHORITY**

[1] The applicant, Vicki Maddock, seeks an order the respondent, Lee European Limited (Lee), comply with the provisions of a section 149 agreement the parties concluded after mediation on 3 August 2017. She also asks a penalty be imposed for the alleged non-compliance and seeks interest and costs.

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

[3] All companies are required to have an address for service.¹ Lee's is 474 Rangitikei Street, Palmerston North. The evidence satisfies me the Notice of Investigation Meeting was served at that address at 11.25am on 24 November 2017.

[4] The notice of meeting includes advice that should a respondent fail to attend the Authority may proceed and issue a determination in favour of the applicant.² I am satisfied Lee is, or at least should be, aware of the consequences of non-attendance. Given the absence of either notice of, or an explanation for, its absence I consider it appropriate to continue.

[5] As already said the parties attended mediation on 3 August 2017. The process ended with a Record of Settlement signed by the mediator pursuant to s 149 of the Employment Relations Act 2000 (the Act).

[6] Amidst other things the settlement required Lee pay Ms Maddock \$5,000 as compensation pursuant to s 123(1)(c)(i) of the Act and provide a certificate of service.

[7] The payment was to be made in two instalments. The first was made but the second, \$2,000, was not and Ms Maddock is yet to receive the certificate of service. Having had an opportunity to question Ms Maddock I accept those assertions. It follows I accept Lee has failed to comply with its obligations and an order it do so will follow.³

[8] Ms Maddock also asks Lee be penalised for its failure to comply with its obligations under the settlement. That this may occur is confirmed by section 149(4) of the Act. Having heard Ms Maddock and Mr Hesketh and in the absence of any contrary argument or evidence I conclude this is a flagrant breach which warrants the imposition of a penalty. Lee's actions have the effect of undermining the integrity of the mediation process and there has been no attempt to address the failures or respond to approaches from either Ms Maddock or the Authority.

[9] Having considered the principles which guide the imposition of a penalty⁴ I conclude \$1,500 is appropriate.

¹ Section 192(1) of the Companies Act 1993

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

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

⁴ *Borsboom (Labour Inspector) v Preet PVT Ltd and Warrington Discount Tobacco Ltd* [2016] NZEmpC 143

[10] Ms Maddock seeks interest. Interest is to reimburse someone for use, by others, of money that is theirs. There can be no doubt Lee has, by failing to make a payment it agreed to, continued to have use of money rightfully belonging to Ms Maddock. This is, I conclude, a circumstance in which interest should be payable, especially in the absence of a contrary argument.

[11] The current rate is 5%.⁵ The outstanding amount was payable no later than 1 September 2017. As of the date of this determination the interest payable is \$28.22 and that will increase by 27 cents a day till payment is made.

[12] Finally there is an application for costs. They total \$866.65 including GST and the filing fee.

[13] Having considered the principles applying to costs,⁶ particularly those relating to actions which cause a party to incur unreasonable and unnecessary costs such as paragraphs [27](c), [29](b) and [29](d) of *Bradbury*, I conclude this is, while unusual, a situation in which an order for indemnity costs should be made.

[14] Once a party enters into a settlement agreement it is bound to comply and Ms Maddock should not be forced to resort to an application such as this. Furthermore, and by failing to respond or otherwise comply with statutory requirements in respect to a response to this application, Lee has ensured Ms Maddock has no option but to incur these unnecessary costs.

Conclusion and Orders

[15] For the above reasons I order the respondent, Lee European Limited:

- a. Comply with the terms of the s 149 settlement it entered into on 3 August 2017 and pay Ms Maddock the sum of \$2,000 (two thousand dollars) being outstanding compensation pursuant to s 123(1)(c)(i) of the Employment Relations Act 2000; and
- b. Provide Ms Maddock with a certificate of service; and

⁵ Judicature (Prescribed Rate of Interest) Order 2011 (2011/177)

⁶ *Fagotti v Acme & Co Ltd* [2015] NZEmpC 135 and *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400

- c. Pay Ms Maddock a further \$28.22 (twenty eight dollars and twenty two cents) being interest owing as of the date of this determination. This will increase by \$0.27 (twenty seven cents) with each calendar day that passes between 13 December 2017 and the date of payment; and
- d. Pay a penalty to the Crown of \$1,500 (One thousand, five hundred dollars). Payment is to be made to the Crown via the Authority; and
- e. Pay Ms Maddock a further \$866.56 (eight hundred and sixty six dollars and fifty six cents) as reimbursement of the costs incurred in making this application.

[16] Lee European Limited is to comply with the orders in paragraph [15] no later than 4.00pm on Monday 18 December 2017.

[17] In closing I caution the respondent and its director, Jason Lee, that failure to comply with the above orders may result in further consequences. Should such a failure be pursued in the Employment Court⁷ they potentially include the imposition of fines, the sequestration of property and/or imprisonment. Conversely, and perhaps more effectively, a certificate of determination may be sourced from the Authority and the matter pursued in the District Court.⁸

M B Loftus
Member of the Employment Relations Authority

⁷ Sections 139 and 140 of the Employment Relations Act 2000

⁸ *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]