

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2024] NZEmpC 159
EMPC 435/2023**

IN THE MATTER OF an application for a compliance order and enforcement

AND IN THE MATTER OF an application for judgment by default

BETWEEN SARIKA BATTA
Plaintiff

AND AUCKLAND CATERING LIMITED
First Defendant

AND RAJESH RAO
Second Defendant

Hearing: On the papers

Appearances: S Greening and E Drew, counsel for plaintiff
No appearance for the first or second defendants

Judgment: 22 August 2024

JUDGMENT OF JUDGE M S KING

Background

[1] Sarika Batta is seeking orders under s 140(6) of the Employment Relations Act 2000 (the Act) against her former employer, Auckland Catering Ltd, and its director, Rajesh Rao. She is seeking them because the defendants failed to satisfy an order by the Employment Relations Authority (the Authority) made on 11 September 2023.¹ It ordered the defendants to comply with a settlement agreement which was certified by a mediator under s 149 of the Act. The settlement agreement required the defendants

¹ *Batta v Auckland Catering Ltd* [2023] NZERA 521 (Member Larmer).

to jointly and severally pay Ms Batta specific amounts by way of direct credit each month to her nominated bank account by specified dates.

[2] On 25 November 2020, the parties agreed to reduce the monthly payment amounts. From March 2021, the payments from the defendants were late and continued to be paid late thereafter. On 5 September 2021, Mr Rao apologised to Ms Batta for the late payments and advised that he was having difficulty paying due to a family member being unwell. The last email communication Ms Batta had with the defendants was on 10 August 2022. Since then, she has not had any further communication from them. She is owed \$1,600, plus interest, which was due to be paid to her by 1 January 2022 under the terms of the settlement agreement.

[3] Ms Batta filed proceedings in the Authority seeking compliance orders. The Authority records that prior to its investigation meeting, Mr Rao advised it that the defendants' restaurant was closed and that he had been overseas for the last couple of months. He requested Ms Batta's bank account details and details of the amount that was due to be paid to her. However, no money was paid to Ms Batta, and the defendants did not participate any further in the Authority's process.²

[4] On 12 September 2023, the Authority issued compliance orders pursuant to s 137 of the Act. Under the orders, the defendants jointly and severally were ordered to pay Ms Batta, no later than 26 September 2023, the following sums:³

- (a) \$1,600 without deduction;
- (b) interest of \$543.52 for the period 1 January 2022 to 12 September 2023, in accordance with the terms of the settlement agreement; and
- (c) interest from 13 September 2023 until the money and interest Ms Batta was owed had been paid to her in full in accordance with the terms of the settlement agreement.

² At [10]–[11].

³ At [48](a).

[5] The Authority also ordered the defendants to reimburse Ms Batta for the filing fee.⁴

[6] The Authority's compliance order has not been complied with, and the present application has been made.

The proceedings were set down for formal proof

[7] Ms Batta's counsel filed an affidavit confirming service of the proceedings on the defendants. Neither Auckland Catering Ltd nor Mr Rao filed a statement of defence or otherwise sought to participate in the proceedings. Ms Batta applied for judgment by default against the defendants.⁵

[8] On 10 June 2024, I recorded in a minute arising from a telephone directions conference that I was satisfied that personal service of the proceeding had been effected on both defendants and that they have elected to take no steps in this proceeding. I directed that the matter will be determined by formal proof on the papers.⁶ A copy of the Court's minute was directed to be served on the defendants so that they would be appraised of the steps being taken. Ms Batta's counsel confirmed that the Court's minute had been served on the defendants. Despite the service of the Court's minute, the defendants have not taken any steps subsequently.

Failure to comply with compliance order

[9] Ms Batta filed an affidavit confirming the terms of the settlement agreement, the payments she has received from the defendants, and the amount outstanding. Her evidence confirmed that, despite the existence of the compliance orders requiring payment of the outstanding amount, she has not received payment of that amount from the defendants. Nor have the defendants made any arrangements to compromise or satisfy the outstanding amount owing to her under the settlement agreement.

⁴ At [48](b).

⁵ High Court Rules 2016, rr 15.3–15.10.

⁶ See Employment Relations Act 2000, sch 3 cl 16.

[10] On the basis of Ms Batta's evidence filed in this proceeding, I am satisfied that the Authority's compliance order has not been complied with.

[11] Where the Authority's compliance order has not been complied with, the adversely affected party may apply to the Court for orders under s 140(6) of the Act. That section reads:

- (6) Where any person fails to comply with a compliance order made under section 139, or where the court, on an application under section 138(6), is satisfied that any person has failed to comply with a compliance order made under section 137, the court may do 1 or more of the following things:
 - (a) if the person in default is a plaintiff, order that the proceedings be stayed or dismissed as to the whole or any part of the relief claimed by the plaintiff in the proceedings:
 - (b) if the person in default is a defendant, order that the defendant's defence be struck out and that judgment be sealed accordingly:
 - (c) order that the person in default be sentenced to imprisonment for a term not exceeding 3 months:
 - (d) order that the person in default be fined a sum not exceeding \$40,000:
 - (e) order that the property of the person in default be sequestered.

[12] The statement of claim sought a fine under section 140(6) of the Act.

Sanction warranted?

[13] When considering an application for a sanction, it is necessary to approach the exercise in a principled way. The first issue is whether a sanction should be imposed at all.

[14] In *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)*, the Court of Appeal made it clear that the primary purpose of the sanction regime is to secure compliance.⁷ A further purpose is to impose a sanction for non-compliance.⁸ Breaching a compliance order is serious and warrants a serious response.⁹

⁷ *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)* [2016] NZCA 464, [2017] 2 NZLR 451 at [57] and [75].

⁸ At [75].

⁹ *Cousens v Star Nelson Holdings Ltd* [2022] NZEmpC 30 at [19]; and *McMillan v Resque Corp 20/20 Ltd* [2023] NZEmpC 76, [2023] ERNZ 308 at [15].

[15] Given the purposes of a sanction under s 140(6), I am satisfied that the defendants' conduct makes it appropriate to impose a fine. The assessment now turns to the amount of that fine.

Assessment factors

[16] The Court of Appeal in *Peter Reynolds* also identified a range of factors to consider when assessing the level of a fine under s 140(6). Those factors are not exhaustive, but they include the nature of the default (that is whether it is deliberate or wilful), whether it is repeated, without excuse or explanation and whether it is ongoing. Any remedial steps will be relevant together with the defendant's track record. The respective circumstances of the employer and employee, the appropriateness of a deterrent penalty and the proportionality of the proposed fine may also be considered.¹⁰

The default is deliberate

[17] The failure to pay the amount ordered is deliberate, ongoing and without excuse. The defendants entered into the settlement agreement to resolve the claims they were facing from Ms Batta. They made a commitment to pay specified amounts by specified dates. While the defendants paid most of the sums owing to Ms Batta under the settlement agreement, they did not make the final payment of \$1,600, or any interest on that amount, which was due to be paid to her on 1 January 2022. The defendants did not participate in the Authority investigation and have failed to comply with the Authority's compliance order, which was issued more than 10 months ago.

No attempts at remediation have occurred

[18] As already noted, the defendants have failed to remediate their failure to comply and have not provided any explanation as to why this has been allowed to occur.

¹⁰ *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)*, above n 7, at [76]–[77].

The defendants do not have a track record

[19] I have no information about the company's track record of failing to meet the Authority's orders. I am prepared to assume that it has no previous poor record.

The circumstances of the defendants

[20] Turning to financial circumstances, the defendants have not provided any evidence of their ability to pay. On 18 January 2024, the Registrar of Companies gave public notice that the Registrar has initiated action to remove the first defendant, Auckland Catering Ltd, from the Companies Office register. It can be inferred that, as the first defendant is no longer trading, it will be struck off the Companies register. An imposition of a fine in these circumstances would be senseless. However, it is still registered with the Companies Register, so it is appropriate that it is subject to a fine.

[21] The financial position of Mr Rao, the second defendant, is unclear. He has failed to participate in proceedings and has not provided evidence of his financial position. Ms Batta's own evidence includes communications with Mr Rao where he advises that he has defaulted on the settlement payments due to illness. Ms Batta, in her responses to Mr Rao, challenges the veracity of his explanation. Mr Rao's communications with the Authority indicates that he accepts that the defendants have some financial means available to pay the outstanding settlement amount to Ms Batta. In these circumstances, while I consider a fine at the maximum end of the scale would be unrealistic, I do not go so far as to find that no fine should be awarded. I find that Mr Rao has the ability to pay a modest fine.

The circumstances of the plaintiff

[22] As regards to the circumstances of Ms Batta, there has been a significant effect on her. She has encountered significant financial inconvenience and personal distress due to the considerable lengths she has had to go in enforcing the terms of the settlement agreement and orders made in the Authority.

Deterrence

[23] In the circumstances, I consider there is a need to impose a sanction on the defendants to deter them and others from breaching orders of the Authority.

Proportionality

[24] The amount outstanding is less than \$3,000 once interest is calculated. Any fine issued must be proportional with that sum.

The level of fine

[25] The maximum fine is \$40,000. Mr Greening, counsel for Ms Batta, submitted that a fine of \$2,000 ought to be imposed on the basis that:

- (a) the amount owing to the plaintiff is modest;
- (b) part-payment has been made of the sums under the record of settlement;
- (c) the defendants have not complied with the compliance order;
- (d) the failure to comply with the compliance order is ongoing; and
- (e) there is no indication from the defendants that they intend to rectify the issue or comply in the near future.

[26] I have reviewed the cases referred to in the Court of Appeal in *Peter Reynolds*, and in the judgments of this Court that were summarised by Judge Smith in *Cooper v Phoenix Publishing Ltd* and subsequent cases of this Court.¹¹

[27] In considering similar cases for breaches of a compliance order made by the Authority, a penalty is likely to fall within the range of \$2,000 to \$5,000.¹²

¹¹ *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)*, above n 7, at [61]–[71]; and *Cooper v Phoenix Publishing Ltd* [2020] NZEmpC 111, [2020] ERNZ 332 at [27]–[35].

¹² See *Jindal v RKM Smith Enterprises Ltd* [2023] NZEmpC 183; *Oliver v Biggs* [2023] NZEmpC 28; and *CTR Roofing Ltd v Cross* [2024] NZEmpC 46.

[28] Standing back and considering all of the factors in this case, including the submissions made by Ms Batta's counsel, I consider that a modest fine of \$2,000 is appropriate and should be imposed.

[29] There is a clear relationship between the defendants. The second defendant, Mr Rao, was a director of the first defendant, Auckland Catering Ltd, and signed the settlement agreement on behalf of himself and the first defendant. The defendants were jointly and severally liable under the terms of the settlement agreement. They therefore shared equal responsibility when defaulting on the terms of the settlement agreement and the subsequent compliance order made by the Authority. In the circumstances, I consider that a fine of \$2,000 be imposed on the defendants and that they be jointly and severally liable for the fine.

[30] Under s 140(7) of the Act, the Court may order part of the fine to be paid to the employee who has brought the proceeding. Counsel on behalf of Ms Batta sought that part of the fine be paid to her. I consider that to be appropriate in the circumstances and direct that 50 per cent of the imposed fine be paid to Ms Batta.

Outcome

[31] Ms Batta's application for compliance orders is successful. Mr Rao and Auckland Catering Ltd are jointly and severally ordered to pay a fine of \$2,000; of that sum \$1,000 is to be paid to Ms Batta and \$1,000 to the Crown. The payments should be paid within 28 days from the date of this judgment.

Costs

[32] Costs are reserved. Ms Batta is to file a memorandum as to costs within 14 days of the date of this judgment.

Judge M S King

Judgment signed at 9 am on 22 August 2024