IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2024] NZEmpC 219
EMPC 261/2024

IN THE MATTER OF	an application for a sanction
AND IN THE MATTER OF	an application for leave to file amended pleadings
BETWEEN	DARREN VINCENT OLIVER Plaintiff
AND	STUART DALE BIGGS Defendant

Hearing:	On the papers
Appearances:	J Pietras, counsel for plaintiff Defendant in person
Judgment:	19 November 2024

INTERLOCUTORY JUDGMENT OF JUDGE B A CORKILL
(Application for leave to file amended pleadings)

Introduction

[1] This judgment determines whether leave to file an amended statement of claim should be granted. The proceeding relates to sanctions sought by a former employee against a director of a former employer. It is the fourth of several proceedings in this Court where compliance difficulties have arisen.[1]

[1] *Oliver v Star Moving Ltd* [2016] NZERA Christchurch 70.

[2] The statement of claim as originally filed sought a term of imprisonment because Stuart Biggs, director of the former employer, Star Moving Ltd, had not made payments, some of which were had been the subject of compliance orders.

[3] Soon after substituted service of the statement of claim was effected, payment of those sums was made by Mr Biggs. The employee, Darren Oliver, accepts that seeking an order of imprisonment of Mr Biggs would accordingly no longer be appropriate. He now wishes to amend the statement of claim so that he may seek a fine – a sanction which was imposed against Mr Biggs on a previous occasion.[2]

[4] The application for leave to file amended pleadings is opposed. An opportunity to file submissions was provided. Mr Pietras, counsel for Mr Oliver, did so; Mr Biggs, acting in person, did not.

[5] Because of the convoluted background of this matter, I am issuing a judgment to resolve this disputed application. A minute is not appropriate because if the application were to be dismissed, the proceeding would come to an end; and if it is granted, I should not rule out the possibility of an application for leave to appeal being advanced.

Background

[6] I begin by outlining a brief summary of the background to the four proceedings filed in this Court.

[7] The first was commenced on 26 September 2019 against Mr Biggs, who had failed to comply with multiple determinations of the Authority.[3]

[8] In that proceeding, Mr Oliver requested that the Court exercise its powers under s 140(6) of the Employment Relations Act 2000 (the Act) to sequester Mr Biggs's property, fine him, or impose a term of imprisonment for up to three months.

---

2 *Oliver v Biggs* [2023] NZEmpC 28.
3 *Oliver v Biggs* [2021] NZEmpC 104, at n 5.

[9] There was, however, a jurisdictional issue because no order of compliance had been made against Mr Biggs to that point. As recounted in my first judgment, this ultimately resulted in an application being made to the Authority for a compliance order, which occurred on 12 January 2021.[4] Following negotiations, the sum involved was paid, leaving an issue between the parties as to costs only. I concluded that Mr Biggs should pay to Mr Oliver the sum of $7,200 as a contribution to his costs.[5]

[10] On 7 October 2021, a second proceeding was filed by Mr Oliver because the costs order in the first judgment had not been paid by Mr Biggs. Mr Oliver sought a compliance order in respect of that sum and an order for solicitor/client costs. Mr Biggs took no part in that proceeding. Ultimately, I made a compliance order that he comply with the costs order of $7,200 made in the first judgment, to be paid within 28 days, and that he pay Mr Oliver costs of $3,600 with regard to that proceeding.[6]

[11] In late September 2022, Mr Oliver filed a third set of proceedings because none of the directed payments had been made. He sought a compliance order in respect of the order for costs made in the second judgment of $3,600, a sanction in respect of the breach of the compliance order as to the payment of costs of $7,200, and costs with regard to the third proceeding.

[12] Again, Mr Biggs took no formal steps. After receiving submissions, I ordered compliance with the costs order made in the second judgment of $3,600 on the basis that the debt would be paid within 28 days, imposed a fine of $3,000 which was to be paid immediately to Mr Oliver, and ordered that costs and disbursements of $2,420.80 be paid within 28 days of the date of that judgment.[7]

[13] I concluded my judgment by saying that if there were yet further defaults, consideration should be given as to whether the provisions of the Insolvency Act 2006 would provide an effective means of finalising the matter.[8]

---

4 *Oliver v Scott Haulage 2010 Ltd* [2021] NZERA 7.
5 *Oliver v Biggs,* above n 3, at [37].
6 *Oliver v Biggs* [2022] NZEmpC 73.
7 *Oliver v Biggs,* above n 2, at [22].
8 At [23].

[14] Notwithstanding that indication, when there was a further default, no step was taken under the Insolvency Act; rather, the present proceeding, the fourth one in the series, was brought on the basis that none of the payments directed in the three previous judgments had been made, and that a term of imprisonment not exceeding three months should be imposed under s 140(6)(c) of the Act. Costs on a solicitor/client basis were also sought.

[15] There were difficulties with service, as a result of which, on 29 July 2024, I issued a minute dispensing with personal service. I directed service of the statement of claim, the Court's minute and any other Court documents approved for service by emailing Mr Biggs at his work email address.

[16] Substituted service by email took place on 29 July 2024. Payment of the outstanding Court judgment sums and interest was made on 2 August 2024.

[17] On 28 August 2024, Mr Pietras suggested in an email that, in the absence of a statement of defence, the claim could proceed on a formal proof basis. An affidavit from Mr Oliver was filed the next day, outlining the attempts that had been made to obtain payment of the outstanding sums up until the date when they were paid. The affidavit indicated that Mr Oliver still wished to pursue his application for a sanction.

[18] In light of these developments, on 8 October 2024, I convened a telephone directions conference to discuss the matter. When offered the opportunity to join the call, Mr Biggs did so.

[19] At the conference I indicated that if a different form of sanction was to be sought, it would be necessary to seek leave to file an amended statement of claim. This was because the proceeding had been brought under s 140 of the Act, and due formality was accordingly required. I will return to this point later. An appropriate timetable was established.

The application for leave and notice of opposition

[20] On 9 October 2024, Mr Oliver filed an application for leave to file an amended statement of claim. A draft pleading was attached.

[21] On 22 October 2024, Mr Biggs filed a notice of opposition. In it he stated it would be unfair and unreasonable to seek a sentence against him personally when he had simply acted for a company, that delays in payment had been contributed to by COVID-19-related financial hardships, that false claims had been made against him which led to confusion, and that matters were being unnecessarily escalated by Mr Oliver's counsel.

[22] Because the application was opposed, I timetabled the filing of submissions.

[23] In his submission, Mr Pietras stated that an application to amend a statement of claim should be granted if this is necessary to determine the real controversy between the parties, but not if it is likely to result in an injustice between the parties.[9]

[24] Mr Pietras submitted that the bringing of a proceeding seeking the sanction of imprisonment was appropriate, given defiance of two previous compliance orders, and in light of a warning contained in *Ugone v Star Moving Ltd*, where the Court stated that Mr Biggs remained at serious risk of a custodial sentence should other cases come before it involving requests for sanctions for non-compliance with court orders.[10] I note that the facts of that case centred on non-payment of compensatory awards.

[25] It was submitted that the amendment was necessary to resolve the controversy between the parties and that there would be no prejudice to Mr Biggs were leave to be granted because a lesser sanction was being sought against him than had originally been claimed. Mr Biggs would also have the opportunity of filing a statement of defence to the amended statement of claim.

[26] In response to an issue raised by the Court, Mr Pietras submitted that a sanction could be imposed, even where compliance had in fact been achieved. This is the effect of a statement made by the Court of Appeal in *Peter Reynolds Mechanical Ltd v Denyer.*[11]

---

9 Mr Pietras relied on *NZ Post Primary Teachers' Assoc v Secretary for Education* [2013] NZEmpC 139 at [55].

10 *Ugone v Star Moving Ltd* [2024] NZEmpC 48 at [52].

11 *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)* [2016] NZCA 464, [2017] 2 NZLR 451 at [77].

[27] When timetabling submissions, I had requested that reference be made to issues of proportionality, another consideration touched on by the Court of Appeal in *Peter Reynolds*.[12] Mr Pietras stated that seeking a yet further sanction, when compliance had in fact been achieved, was proportionate.

[28] He also stated that were the application for leave to be granted and were Mr Biggs not to file a statement of defence, it was the plaintiff's strong preference that the application be determined on the papers.

[29] As stated, Mr Biggs did not provide submissions.

Analysis

[30] Proceedings under s 140(6) of the Act are essentially quasi-criminal proceedings and ought to receive comparable procedural protections.[13] It was for that reason that I took the view that a formal application for leave should be brought to the Court so that Mr Biggs could, if he chose, have the opportunity of taking part in the process of amending the statement of claim. He has filed a notice of opposition, so the application must be regarded as being opposed. Moreover, I did not consider that amendment is an entitlement of right, even if it might be more likely in the case of a routine claim.

[31] Mr Pietras submitted that Judge Ford's dicta in *NZ Post Primary Teachers' Assoc v Secretary for Education* is of assistance; there, the Court said that s 189 of the Act provides an appropriate basis for considering whether justice, according to the equity and merits of the case, would be appropriately met by amending the statement of claim.[14]

[32] Turning to the proposed pleading, it has some difficulties. On the face page it states that it is an application for a compliance order under s 139, rather than an application for a sanction under s 140(6). However, in the body of the proposed document, it seems reasonably clear that what is to be sought is a fine.

---

12 At [76].
13 *RPW v H* [2018] NZEmpC 131 at [13].
14 *NZ Post Primary Teachers' Assoc,* above n 9, at [56].

[33] The next difficulty is that a fine can only be imposed under s 140(6) where a compliance order has been made previously. Not all of the unpaid sums were the subject of a compliance order at the time of payment. The only amounts which could have so qualified were two costs orders for $7,200 and $3,600.[15] The fine of $3,000 imposed on 28 February 2023, and the order of $2,420.80 for costs and disbursements directed for payment on the same date, were not the subject of compliance orders at the time of payment.

[34] This means that when the application for a term of imprisonment was made, it could only have related to the two costs awards. Were the statement of claim to be amended to permit a claim for a fine to be substituted, the focus would be limited to non-payment of these amounts.

[35] I note that those amounts do not relate to the core proceedings which resulted in remedies being awarded in Mr Oliver's favour against his former employer, as would normally be the case, but to a series of attempts to impose sanctions against Mr Biggs as a director of Star Moving Ltd from 2019 onwards when costs were not paid.

[36] A relevant consideration is that, despite the reference in the third judgment to the provisions of the Insolvency Act 2006, no step was taken under that statute. A bankruptcy notice could have sought recovery of all the outstanding sums together and would not have involved the somewhat cyclical processes which have been undertaken. Bankruptcy proceedings are a potent mechanism for the enforcement of outstanding debts.

[37] The process that has been adopted in this, the fourth proceeding, could give rise to yet further problems. Were a fine to now be imposed, and a further order for costs made, and if those sums were not paid by Mr Biggs, I am concerned that a yet further application for a compliance order, and then an application for sanctions under s 140(6), would be brought given the focus on proceedings of this type to date and notwithstanding the view expressed at the conclusion of my third judgment. That would be regrettable because the cycle of serial applications would simply continue. In these circumstances, continued applications of this sort may be disproportionate

---

[15] See above at [10] and [12].

and contrary to the primary purpose of the section, which is to secure compliance particularly in those cases where compensatory awards remain unpaid.[16]

[38] It is worth emphasising that the sanctions provided for in s 140(6) – particularly sequestration and imprisonment – are last resort options where non-compliance occurs.[17]

[39] Reference to s 141 of the Act confirms that Parliament did not intend that the only option for enforcing non-payment of a fine is to seek a yet further sanction such as another fine. That section allows expressly for the filing of an order or judgment, including an order imposing a fine, in the District Court. It is then enforceable in the same manner as an order or judgment given by the District Court.[18]

[40] Thus, Parliament made it clear that a fine could be enforced in the same way as any other civil debt. Any such debts may, if more than $1,000, be the basis of an application for a debtor to be adjudicated bankrupt.[19]

[41] However, by a narrow margin, I have decided to grant leave to amend the current statement of claim.

[42] That is because it is more appropriate for the issues I have traversed to be considered at a hearing where all matters that both parties may wish to advance about their respective positions as to the process which has been adopted can be considered.

[43] Although there is a risk of the previous problems arising again, it may be preferable for any enforcement to be dealt with via a bankruptcy proceeding. That single step would obviate the difficulty of two applications having to be brought (first, for a compliance order, and then for a sanction).

[44] I also record that had Mr Biggs not paid the amounts involved in August 2024, it is likely I would have needed to consider whether it was appropriate to stay the claim

---

16 See *Peter Reynolds*, above n 11, at [75]–[77].
17 At [56]–[57].
18 Part 3 of the Summary Proceedings Act 1957 is also available, see s 141(2) of the Employment Relations Act 2000.
19 Insolvency Act 2006, s 13.

for an order of imprisonment to allow Mr Oliver to adopt a less draconian means of enforcement, such as under the Insolvency Act.[20] This point may subsequently be relevant to any further fine or costs order made in this proceeding, although that is of course a matter for the Judge dealing with the matter.

Result

[45] I grant leave to the plaintiff to file and serve an amended statement of claim within 14 days of the date of this judgment.

[46] Mr Biggs will have a further 14 days within which to file and serve a statement of defence.

[47] I reserve costs.

B A Corkill
Judge

Judgment signed at 8.30 am on 19 November 2024

[20] *Peter Reynolds*, above n 11, at [56].