



Employment Court of New Zealand

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Cousens v Star Nelson Holdings Limited [2022] NZEmpC 30 (24 February 2022)

Last Updated: 2 March 2022

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2022\] NZEmpC 30](#)

EMPC 273/2021

IN THE MATTER OF an application for a compliance order
BETWEEN MURRAY COUSENS
 Plaintiff
AND STAR NELSON HOLDINGS LIMITED
 First Defendant
AND STUART BIGGS
 Second Defendant

Hearing: 24 February 2022
 (Heard at Christchurch via Audio Visual
 Link)
Appearances: P Mathews, advocate for plaintiff No
 appearance for defendants
Judgment: 24 February 2022

ORAL JUDGMENT OF JUDGE K G SMITH

[1] Murray Cousens is seeking orders against his former employer Star Nelson Holdings Ltd under [s 140\(6\)](#) of the [Employment Relations Act 2000](#) (the Act). He applied for sanctions to be imposed on the company because it has not complied with an order made by the Employment Relations Authority under [s 137](#) of the Act.¹

[2] Star Nelson Holdings Ltd has not taken any step in this proceeding. In an abundance of caution this morning, I have had the company paged and a search was made of the Court's precincts in case a representative of the company was intending

¹ *Cousens v Star Nelson Holdings Ltd* [\[2021\] NZERA 305 \(Member D Beck\)](#).

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to make an appearance and seeking to participate in the hearing. The company did not appear.

[3] On 15 February 2021 the Authority issued a determination finding that Mr Cousens was unjustifiably dismissed and unjustifiably disadvantaged by Star Nelson.² The determination held that the company breached the duty of good faith owed to Mr Cousens in such a manner that a penalty was appropriate. The Authority made the following orders:

- (a) The company was ordered to pay Mr Cousens \$6,131.12 gross for lost wages pursuant to [s 123\(1\)\(b\)](#) of the Act.
- (b) It was ordered to pay \$25,000 compensation to Mr Cousens pursuant to [s 123\(1\)\(c\)\(i\)](#) of the Act.
- (c) A penalty was imposed of \$4,000, half payable to the Crown and the balance to Mr Cousens.
- (d) The company was ordered to pay a contribution to Mr Cousens' costs of \$3,000.

[4] The orders made by the Authority were not complied with.

[5] On 19 July 2021 the Authority made a compliance order, under [s 137](#) of the Act.³ It required Star Nelson to comply with the determination of February 2021, within 14 days of the date of the determination.

[6] I pause at this stage to observe that the Authority's determination, making a compliance order, deviated slightly from the original determination. The company was required to comply with the 15 February 2021 determination but so far as the penalty was concerned the compliance order described it as being \$2,000. This point is mentioned for completeness and nothing turns on it.

2 *Cousens v Star Nelson Holdings Ltd* [2021] NZERA 52 (Member D Beck).

3 *Cousens*, above n 1.

[7] In addition, the Authority ordered the company to pay a further \$500 for the costs of the compliance order proceeding and to reimburse Mr Cousens for the lodgement fee of \$71.56.

[8] The Authority's compliance order has not been obeyed. None of the amounts ordered to be paid in the determination of February 2021 have been paid.

[9] This morning I heard from Mr Cousens who explained the unsuccessful efforts made on his behalf to obtain payment from Star Nelson. Aside from steps taken in the Authority to obtain a compliance order Mr Cousens' representative, Mr Mathews, has written to the company requesting payment but has had no acknowledgement or response from it.

[10] The company is aware of the two proceedings in the Authority that led to the determinations just referred to as well as this proceeding. It took some limited steps in the Authority although did not turn up at either investigation meeting. The statement of claim in this proceeding was served on the company on 9 November 2021. Another copy of the statement of claim was served on the company's director, Stuart Dale Biggs, together with a copy of the Authority's determination of 19 July 2021.

[11] Under [s 138\(6\)](#) of the Act where an order made by the Authority under [s 137](#) has not been complied with the affected person may apply to the Court for orders under [s 140\(6\)](#).

[12] [Section 140\(6\)](#) 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.

[13] Mr Cousens is seeking a fine to be imposed on Star Nelson under [s 140\(6\)\(d\)](#). His statement of claim sought other sanctions under [ss 140\(6\)\(a\)](#), (b), (c) and (e). Some of those sanctions are not available. Mr Mathews accepted that orders could not be made against Mr Biggs, who is cited as the second defendant, because he was not a party to the Authority investigations. Mr Mathews confirmed that the relief being pursued today is confined to seeking a fine against the company because the circumstances, at present, do not support the sequestration of its property. He requested, however, that leave be reserved to Mr Cousens to be able to bring further applications if the compliance order remains unsatisfied. I deal with that matter at the end of this decision.

[14] In *Peter Reynolds v Labour Inspector*, the Court of Appeal referred to a range of factors to consider in assessing the level of a fine.⁴ Those factors are not exhaustive but 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 need to be taken into account as is the appropriateness of a deterrence and the proportionality of the proposed penalty.

[15] Relying on those factors in *Peter Reynolds*, Mr Mathews submitted that the fine to be imposed should be \$15,000. In support of that request the factors the Court was asked to take into account were:

(a) the contempt the defendant showed the Authority by not engaging in its proceedings;

(b) the contempt the defendant showed the Authority by ignoring it; and

(c) the contempt the defendant has shown to the Court by not engaging in these proceedings.

4 *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer (Labour Inspector)*

[\[2016\] NZCA 464](#); [\[2017\] 2 NZLR 451](#); [\[2016\] ERNZ 828](#).

[16] Supplementing those arguments was an observation that Mr Biggs, who is a director of Star Nelson, has previously been connected with similar conduct as Mr Cousens encountered; that is, by not taking part in Authority proceedings and disregarding its orders.

[17] That was a reference to another determination of the Authority in *Oliver v Scott Haulage 2010 Ltd* where Mr Biggs was ordered to take steps to have the recalcitrant company comply with previously made Authority orders.⁵ Mr Mathews submitted that Scott Haulage did not engage in the Authority's proceeding or pay the money it was ordered to pay to the successful applicant. The determination in *Scott Haulage* was challenged but the proceeding was discontinued.⁶

[18] The link between the *Scott Haulage* determination and this case was Mr Biggs who is the sole director of both companies and who is said to have been responsible for the behaviour of each company and to have had full knowledge of this proceeding. Mr Mathews stopped short of attempting to link the track record of Scott Haulage to the track record of Star Nelson but, nevertheless, submitted that as their controlling director Mr Biggs influenced both companies and that should have some bearing on the level of a fine.

A penalty?

[19] The first issue is to consider whether a sanction should be imposed at all. Breach of a compliance order is serious and requires a serious response. As *Peter Reynolds* made clear the primary purpose of [s 140\(6\)](#) is to secure compliance with the orders made by the Authority. A further purpose is to impose a sanction for non-compliance in and of itself.⁷

[20] I am satisfied that Star Nelson's conduct makes it appropriate to impose a sanction by way of a fine. The next issue is to determine the amount of that fine.

5 *Oliver v Scott Haulage 2010 Ltd* [\[2021\] NZERA 7 \(Member D Beck\)](#).

6 *Oliver v Biggs* [\[2021\] NZEmpC 104](#).

7 *Peter Reynolds Mechanical Ltd T/A the Italian Job Service Centre v Denyer (Labour Inspector)*

[\[2016\] NZCA 464](#), [\[2016\] ERNZ 828](#).

The nature of the default

[21] Mr Mathews submitted that the company's default was deliberate, wilful and ongoing.

[22] The company was served with the Authority's determination of July 2021, and this proceeding. It has received correspondence from Mr Mathews about what it owes to Mr Cousens. In the face of all of those steps the company has elected not to do anything and the only reasonable inference to draw from that lack of a response is that the behaviour is deliberate and wilful. Since the default has not been remedied the behaviour is ongoing.

Remediation

[23] From those comments it will be obvious that the company has not remediated its default in complying with the Authority's compliance order. It has not paid Mr Cousens and no arrangements have been made with him to satisfy the determination in some other way.

Defendant's track record

[24] I am not persuaded, on the present information, that it would be right to attribute the Authority's adverse findings in *Scott Haulage* to Star Nelson even in the limited way that Mr Mathews referred to. The link between the two cases is that they share a director but that connection, by itself, I think, would be insufficient in this case. Such an approach would effectively treat the two companies as one and, without evidence about how they operate, that conclusion would be inappropriate.

The circumstances of the employer including financial circumstances

[25] There is no information before the Court about the financial circumstances of Star Nelson. I understand from Mr Cousins that the company continues to trade and has branches in Nelson, Christchurch and elsewhere. I consider it is appropriate to assume it is in a position to pay a fine.

The circumstances of the employee

[26] There has been a considerable impact on Mr Cousins. He has been forced to borrow money to meet his living expenses; pay bills and pay for groceries. He said, and I accept, that not being paid by the company has caused him considerable financial difficulty, personal anxiety and distress. Part of that distress only needs to be referred to and that is his sleepless nights caused by the circumstances he has found himself in resulting from the company's non-compliance.

Deterrence

[27] In the circumstances outlined, there is a need to impose a sanction on Star Nelson to deter it from further breaches of the Authority's orders. It is also, I consider, appropriate to take into account general deterrence to underscore that Authority determinations must be complied with.

The fine

[28] The maximum fine is \$40,000.

[29] In *Cooper v Phoenix Publishing Ltd* I reviewed recent cases that had been decided up to that point in time and concluded they illustrated that where an employer in breach had taken no steps to address that breach, and there were no issues about capacity to pay, or history of previous breaches, the starting point for the assessment of an appropriate fine was approximately \$10,000.⁸ The fine in that case was set at

\$12,000. In some of the cases referred to in that review lower fines were imposed but the circumstances of those cases justified a reduced penalty.

[30] Since then, as Mr Mathews mentioned, there have been two other decisions to consider. One is *Mackay v Wanaka Pharmacy Ltd* and the other is *Gates v DC Cladding and Re-cladding Solutions Ltd*.⁹ In both cases, Judge Beck began her assessment at \$10,000. In *Mackay*, Judge Beck agreed that a starting point of \$10,000

⁸ *Cooper v Phoenix Publishing Ltd* [2020] NZEmpC 111.

⁹ *Mackay v Wanaka Pharmacy Ltd* [2021] NZEmpC 79; *Gates v DC Cladding and Re-cladding Solutions Ltd* [2020] NZEmpC 176.

might be appropriate in the same circumstances as I outlined above, but decided to impose a fine of \$8,000 because of the remedial steps taken by the defendant.

[31] In this case I have decided that an appropriate fine to impose is \$10,000. That conclusion has been reached by taking into account the fact that the breach by the company is wilful and deliberate, as has just been described, the default is ongoing and there have been significant impacts on Mr Cousins arising from it. I have also taken into account the need to deter this defendant from repeating the behaviour, and as a general deterrence to other employers faced with Authority determinations, so that they realise the importance of satisfying Authority orders.

[32] The fine is a quarter of the maximum. Stepping back and looking at the proportionality of the fine I am satisfied that it is appropriate bearing in mind the nature of the breach of the compliance order and that the amount of money due to Mr Cousins is a considerable sum.

[33] Under [s 140\(7\)](#) of the Act the Court may order that a portion of the fine be made payable to the employee who has brought the proceeding. It is appropriate for part of the fine to be imposed on Star Nelson to be made payable to Mr Cousins in recognition of the impact on him of the company's non-compliance and to attempt to address some of the distress the non-compliance has caused. It is reasonable, I think, to require the sum of \$6,000 to be payable to Mr Cousins.

[34] As I mentioned at the beginning of these remarks, the statement of claim sought other sanctions against the company under [s 140\(6\)](#) of the Act aside from a fine. The one that I discussed with Mr Mathews during the course of his submissions was the ability to seek sequestration of the company's property. He sought the ability to preserve that part of the relief claimed in the statement of claim, as a potential available remedy if the breach continues. I agree that reservation of the ability to make a further application, without filing further proceedings, is appropriate.

[35] Leave is reserved to Mr Cousens to seek further or other sanctions under [s 140\(6\)](#) if the Authority's compliance order is not complied with by Star Nelson on or before **24 March 2022**.

Costs

[36] A contribution to Mr Cousens' costs in the sum of \$3,000 is sought. That is a proportion of his actual costs and is less than might be awarded if Category 1 Band A of the Court's Guideline Scale was to be applied.¹⁰

[37] Mr Cousens has been put to substantial effort and cost in bringing this proceeding and I am satisfied it is appropriate to make a costs order in his favour. The sum sought is reasonable.

Outcome

[38] Pursuant to [s 140\(6\)](#) of the Act, Star Nelson Holdings Ltd must pay a fine of \$10,000 and of that sum \$6,000 is payable to Mr Cousens.

[39] In addition to the amounts I have just referred to in paragraph [38] Star Nelson is to pay costs to Mr Cousens of a further \$3,000.

[40] Leave is reserved to apply for further sanctions.

K G Smith Judge

Judgment delivered orally at 9.56 am on 24 February 2022

¹⁰ ["Employment Court Practice Directions"](#) at No 16.