Employment Court of New Zealand

Labour Inspector v Star Moving Limited [2023] NZEmpC 132 (18 August 2023)

Last Updated: 23 August 2023

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[2023] NZEmpC 132
EMPC 98/2023

IN THE MATTER OF	an application for a compliance order
BETWEEN	A LABOUR INSPECTOR Plaintiff
AND	STAR MOVING LIMITED First Defendant
AND	STAR NELSON HOLDINGS LIMITED Second Defendant

Hearing:	18 August 2023 (Heard at Christchurch via Audio Visual Link)
Appearances:	A Miller and G La Hood, counsel for plaintiff No appearance for defendants
Judgment:	18 August 2023

ORAL JUDGMENT OF JUDGE K G SMITH

[1] On 16 June 2022, a Labour Inspector was granted a compliance order under s 137 of the Employment Relations Act 2000 (the Act) by the Employment Relations Authority.1

[2] The Inspector's application was made in July 2021 because previously she had required both Star Moving Ltd and Star Nelson Holdings Ltd to provide to her records and employment agreements for their respective employees.

1 *A Labour Inspector v Star Moving Ltd* [2022] NZERA 252 (Member Doyle).

[3] On 10 February 2021 the Inspector issued to both companies notices under s 229 of the Act.

[4] The notices served by the Inspector were in materially identical terms. She identified herself as a warranted Inspector under the Act and required each company to provide to her copies of:

(a) wage and time records kept pursuant to s 130 of the Act;
(b) holiday and leave records kept pursuant to s 81 of the Holidays Act 2003; and
(c) employment agreements.

[5] The Inspector's powers include being enabled to seek documents and information under this Act and the Holidays Act. The notices complied with the Inspector's statutory powers.

[6] Each notice specified a three-year period to which it related namely from 10 February 2018 to 10 February 2021 and applied to all each company's employees.

[7] Attached to each notice was a copy of s 130 of the Act, s 81 of the Holidays Act, and a copy of s 229 under which the Inspector acted.

[8] The Inspector took this step because between 8 April 2020 and 23 February 2021 complaints were made to Employment New Zealand by eight current or former employees of one or other company alleging that they had not received the wage subsidy payable during the COVID-19 lockdown period in March and April 2020.

[9] The Inspector was also concerned to investigate whether those employees had, or had not, received various minimum employment entitlements.

[10] The Inspector's investigation began on 11 June 2020. She spoke with the common director of the companies, Stuart Biggs, on 27 November 2020 to tell him about the existence of the complaints and to request employment records including a

list of employees for each company. On 29 November 2020, he sent some information to her relating to the defendant Star Nelson. However, he did not answer the Inspector's request to provide her with a list of employees for each company.

[11] The Inspector made a further request for a list of employees for each of the companies on 16 December 2020. She got no response.

[12] The Inspector's next step was on 10 February 2021 when she served the company notices under s 229 of the Act I have just referred to.

[13] The companies did not reply in substance to the notices, but receipt of them at their registered office was acknowledged.

[14] On 11 June 2021, the Inspector sent a letter to each company reminding them that she had not received any of the requested records and informing them that she intended to apply to the Authority for orders. This correspondence drew a response. Several emails were exchanged between the Inspector and Mr Biggs during which he was advised that the requested employment records had not been supplied and that the purpose of asking for that information was to check compliance with certain employment minimum entitlements or employment standards.

[15] The lack of progress and failure to respond to the notices led to the Inspector lodging an application in the Authority on 6 July 2021, seeking compliance orders and penalties.

[16] As I have mentioned, the Authority issued a determination on 16 June 2022.2 Compliance orders were made under ss 229(4) and 137 of the Act. Both defendants were ordered to comply with the Inspector's notices and, specifically, to produce wage, time, holiday and leave records, and employment agreements for all employees and for the stated period.

[17] Star Moving and Star Nelson were each ordered to comply within 28 days from the date of the determination. The companies did not comply. The Inspector

2 *A Labour Inspector*, above n 1.

calculated that time allowed by the Authority for compliance expired on 14 July 2022. The records required were not provided by the defendants by that time or, as the Inspector has confirmed today, at any time subsequently. She has also confirmed to me that the companies have not explained why they have failed to comply either with the notices or the Authority's compliance order.

[18] The Authority imposed penalties and I was told by Mr Miller this morning that Star Nelson has paid the penalty although Star Moving has not. The imposition of penalties, and whether they were paid, is not a relevant consideration to this application and is mentioned for completeness.

[19] Star Moving and Star Nelson knew orders were made. Mr Biggs acted as their agent in the Authority investigation. Further, on 12 October 2022, the Inspector sent to Mr Biggs an email reminding him about the orders and that they had not been complied with. That correspondence elicited a response, not from Mr Biggs but another person on behalf of the companies, asking what records were required and confirming that they would be sent. That correspondence was followed up by the Inspector on 14 November 2022. Despite the promised response there has been no further correspondence for or on behalf of either company and the Authority's orders remain unanswered as I have just mentioned.

[20] Under s 138(6) of the Act where an order made by the Authority under s 137 has not been complied with an application may be made to the Court for orders under s 140(6). 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.

[21] The Inspector is seeking today only fines under s 140(6)(d).

[22] 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.3 The factors referred to 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. The assessment includes taking account of any remedial steps taken by the defendant and its track record. The Court of Appeal referred to the respective circumstances of the employer and the employee being taken into account as well as the need for deterrence and the proportionality of the proposed penalty.

[23] Mr Miller referred to the *Peter Reynolds* decision in his submissions. In summary, he submitted that:

(a) a sanction by way of a fine for each company is appropriate;

(b) each of the defendant's non-compliance with the Authority's orders was at the higher end of the scale of non-compliance and was conduct that could be described as "flat defiance" or at the very least "passively ignoring" the orders;

(c) the failures are ongoing;

(d) the defendant Star Nelson has previously appeared before the Court for not complying with a compliance order and fined; and

(e) all indications are that the defendants continue to operate and therefore, it should be assumed, are financially capable of satisfying a fine.

3. *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)* [2016] NZCA 464, [2017] 2 NZLR 451, [2016] ERNZ 828.

[24] I pause at this point to note briefly that Mr Miller very responsibly told me that it has come to the Inspector's attention that there may be liquidation proceedings currently before the High Court relating to the first defendant, Star Moving, although they are yet to be heard. It would not be appropriate to assume anything about the company's circumstances arising from that information other than it is involved in litigation that is yet to conclude.

[25] As to the Inspector's circumstances it should be noted that she is exercising statutory powers to ascertain whether employees have received their statutory entitlements. The ongoing frustration of her inquiry therefore has a bearing on this assessment.

[26] Mr Miller submitted that a fine in the range of $10,000—$15,000 would be a proportionate response to the non-compliance by Star Moving and a fine between

$15,000–$20,000 would be appropriate for Star Nelson.

A penalty

[27] The first issue to consider is whether a sanction should be imposed at all. There is no doubt that the failure or refusal by both companies to comply with the Authority's compliance order is serious. It is, as Mr Miller submitted, tantamount to contempt.

[28] In *Peter Reynolds*, the Court of Appeal observed that the primary purpose of s 140(6) is to secure compliance. A further purpose is to impose sanctions for non- compliance.4 I agree with Mr Miller that this situation calls for sanctions and that fines are appropriate.

[29] I will deal with the circumstances of each company separately beginning with Star Moving.

4 At [75].

Star Moving

[30] Mr Miller submitted that it is important to consider the nature of the default relying on *Howitt Transport Ltd v Transport and General Workers'* as adopted by *New Zealand Railways Corp v New Zealand Seamens IUOW*.5 The reference to those decisions was to support a submission that there may be a range of circumstances giving rise to non-compliance from at the top end of a scale of flat out defiance moving down to passively ignoring the orders or perhaps half-heartedly attempting to comply. The bottom of the scale was, he said, described as being where there had been a genuine use of best endeavours to comply that was unsuccessful.

[31] That is a useful description and assessment tool. Using that tool Mr Miller said that this breach by Star Moving falls at the higher end of the scale; it was in defiance of the Authority or at the very least passively ignoring it. I agree. Mr Biggs' presence at the Authority's investigation, and the subsequent correspondence from the Inspector and its acknowledgment on behalf of the company, point to the conclusion that the compliance orders have been defied or at the very least passively ignored. Taking the most generous position for this assessment, I elect to give this company the benefit of the doubt and to conclude that it has passively ignored the Authority rather than wilfully defied it.

[32] There has been no remediation. Star Moving does not have an adverse track record and, so far as the Inspector is aware, it continues to trade and there is no reason to think it is presently incapable of paying a fine.

[33] I have already touched on the failure or refusal to comply with the notices and the Authority's orders as impacting on the Inspector's ability to discharge statutory functions and powers and, in turn, to be satisfied that employees have been properly treated.

5. *Howitt Transport Ltd v Transport and General Workers' Union* [1973] ICR 1 at 11; *New Zealand Railways Corp v New Zealand Seamens IUOW* [1989] 2 NZILR 613 at 625.

[34] I agree with Mr Miller that there should be a significant element of deterrence in the penalty, to deter this defendant from not complying with Authority orders but also to act as a general deterrent.

[35] Mr Miller referred to my previous decision in *Cooper v Phoenix Publishing Ltd* which contained a review of recent cases which contemplated a starting point for the imposition of penalties of $10,000 in certain circumstances.6 He submitted that in this case, given that the breach is serious, no steps have been taken to remedy it, and there is no issue of an inability to be able to pay that an appropriate fine would be in the range of $10,000—$15,000.

[36] Weighing up all of those factors, and especially the assessments referred to in *Cooper* earlier, I am satisfied that it is proportionate and appropriate to impose a fine on the company of $10,000.

Star Nelson

[37] The same assessment criteria apply to Star Nelson as I have just outlined for Star Moving with one additional factor to consider. Star Nelson has previously been fined $10,000 under s 140(6) because it did not satisfy a compliance order.7

[38] In this case I would ordinarily have elected a similar starting point for this company as I used for Star Moving, namely $10,000. In assessing the overall fine, however, an uplift is required to take into account its previous appearance and poor record when it comes to complying with Authority orders. A 30 per cent uplift is warranted, which produces a fine of $13,000.

[39] Standing back and considering the fine proposed to be imposed on Star Nelson, I am satisfied that it is proportionate and appropriate.

6 *Cooper v Phoenix Publishing Ltd* [2020] NZEmpC 111, [2020] ERNZ 332.

7 *Cousens v Star Nelson Holdings Ltd* [2022] NZEmpC 30.

Conclusion

[40] Pursuant to s 140(6) of the Act:

(a) Star Moving is fined $10,000.
(b) Star Nelson is fined $13,000.

Costs

[41] The Inspector is entitled to costs. They are fixed as requested at Category 1 Band A. If necessary, the Inspector may file a memorandum to have those costs determined.

K G Smith Judge

Judgment delivered orally at 10.44 am on 18 August 2023