



# Employment Court of New Zealand

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## McKay v Wanaka Pharmacy Limited [2021] NZEmpC 79 (27 May 2021)

Last Updated: 2 June 2021

IN THE EMPLOYMENT COURT OF NEW ZEALAND CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA ŌTAUTAHI

[\[2021\] NZEmpC 79](#)

EMPC 48/2021

IN THE MATTER OF    an application for compliance  
                                 order  
BETWEEN                NICOLA JANE MCKAY  
                                 Plaintiff  
AND                        WANAKA PHARMACY LIMITED  
                                 First Defendant  
AND                        WANAKA SUN (2003) LIMITED  
                                 Second Defendant

Hearing:                On the papers  
Appearances:        R Towner, counsel for plaintiff  
                                 J Grant, counsel for  
                                 defendants  
Judgment:             27 May 2021

### JUDGMENT OF JUDGE KATHRYN BECK

[1] This is a claim by Ms McKay against Wanaka Pharmacy Ltd (WPL) and Wanaka Sun (2003) Ltd (WSL), seeking orders under [ss 138\(6\)](#) and [140\(6\)](#) of the [Employment Relations Act 2000](#) (the Act) that the defendants be fined a sum of

\$40,000 because they have not complied with a compliance order made on 23 December 2020 by the Employment Relations Authority (the Authority) under [s 137](#) of the Act.<sup>1</sup>

1 *McKay v Wanaka Pharmacy Ltd* [\[2020\] NZERA 540 \(Member Doyle\)](#) (compliance).

NICOLA JANE MCKAY v WANAKA PHARMACY LIMITED [\[2021\] NZEmpC 79](#) [27 May 2021]

### Background

[2] The compliance order relates to a determination of the Authority dated 16 June 2020 which held, among other things, that:

- (a) Ms McKay was an employee of WPL and WSL;
- (b) she was unjustifiably dismissed from her employment; and
- (c) WPL and WSL were ordered to pay:
  - (i) compensation under [s 123\(1\)\(c\)\(i\)](#) of the Act in the sum of \$13,000 without deduction;
  - (ii) holiday pay in the sum of \$57,334.24 (gross);
  - (iii) reimbursement of fuel costs incurred between 5 and 18 September 2018; and
  - (iv) costs in the sum of \$500, together with reimbursement of the filing fee of \$71.56.

[3] WPL and WSL have paid the sum of \$13,724.83 to Ms McKay, being the compensation, fuel costs and hearing costs. They

did not pay the holiday pay of

\$57,334.24 as they said the amount is overstated. They accept some holiday pay is due.

[4] They have filed a non-de novo challenge to the Authority's determination – specifically, the holiday pay order. That challenge is set down for hearing on 16 and 17 June 2021.

2 *McKay v Wanaka Pharmacy Ltd* [2020] NZERA 230 (Member Doyle) (substantive).

[5] Despite indicating that they would do so, at the time of Ms McKay filing these proceedings, WPL and WSL had not applied for a stay of proceedings with regard to the Authority determination.

[6] In November 2020 Ms McKay applied to the Authority, seeking a compliance order that the defendants pay her the holiday pay of \$57,334.24 and costs on an indemnity basis.

[7] That application was dealt with on the papers. The defendants provided financial information but chose not to file submissions in the Authority.

[8] On 23 December 2020 the Authority ordered WPL and WSL to comply with its 16 June 2020 determination and the order at [110(b)] of that determination, and pay to Ms McKay the holiday pay sum of \$57,334.24 by 3 February 2021.<sup>3</sup> It also ordered that WPL and WSL pay to Ms McKay the sum of \$1,325 in costs and \$71.56 in reimbursement of the filing fee.

[9] Despite the determination and the subsequent compliance order, WPL and WSL have not made payment of the holiday pay to Ms McKay or taken any steps to do so.

[10] On 15 February 2021 Ms McKay filed these proceedings, seeking sanctions against that non-compliance.

[11] I have received two affidavits from Ms McKay in support of her application and an affidavit from Mr Aaron William Heath, the sole company director and shareholder of WPL and WSL. Both parties filed written submissions.

[12] The situation between the parties is difficult. Ms McKay was married to, but is now separated from, Mr Heath. They have three children together. She worked in the family businesses for 15 years (since October 2005). Her employment was unjustifiably terminated after the relationship ended. The defendants do not challenge

3 *McKay* (compliance), above n 1.

the finding in relation to the dismissal. As noted above, it is the holiday pay order that they are challenging.

[13] It was expected that the parties would confer and the defendants either file and serve an application for a stay of proceedings, or an appropriate memorandum, by 23 October 2020. No documentation was filed at that time.

[14] Through her counsel, Mr Towner, Ms McKay advised the companies' solicitor that she would agree to a stay of proceedings on the basis that there was payment of

\$57,334.24 into court.

[15] No documents were filed and, accordingly, Ms McKay was entitled to take steps to enforce the determination if she wished to do so.

[16] On 13 April 2021 WPL and WSL presented for filing, somewhat belatedly, an application for a stay of proceedings. There were issues with that filing and the application was only properly filed and served on 20 May 2021. It is yet to be determined and, due to timing, if it proceeds, will now need to be dealt with at the hearing itself on 16 June 2021.

[17] It has taken a compliance order and the filing of these proceedings, together with affidavits and submissions, before an application for stay was filed. There is no supporting memorandum or other documentation. No explanation is given for the delay other than the focus was on resolving the broader issues between Ms McKay and Mr Heath, which has not been possible.

[18] Importantly, there is no proposal for payment into court in the application, even of the amount the defendants say is due, despite Mr Heath, in his affidavit, stating that the defendants could have made an initial payment of \$5,000 last month, and a further

\$5,000 this month. Nothing has been paid to date.

## The law

[19] The power to impose a sanction is set out in [s 140\(6\)](#) of the Act:

(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.

[20] The first issue is to consider whether a sanction should be imposed at all. Breach of a compliance order is taken very seriously. The primary purpose of [s 140\(6\)](#) is to secure compliance; a further purpose is to impose a sanction for non-compliance.<sup>4</sup>

[21] In this case, I consider a fine is an appropriate sanction. In *Peter Reynolds Mechanical Ltd v Denyer* the Court of Appeal indicated that a range of factors will be relevant in assessing the level of a fine.<sup>5</sup> Those factors include the nature of the default (deliberate or wilful), whether it is repeated, without excuse or explanation, and whether it is ongoing or otherwise. Any steps taken to remedy the breach will be relevant, together with a defendant's track record. Proportionality is another factor and will require some consideration of the sums outstanding. Finally, the respective circumstances of the employer and the employee, including their financial circumstances, will be relevant.

<sup>4</sup> *Peter Reynolds Mechanical Ltd v Denyer* [\[2016\] NZCA 464](#), [\[2016\] ERNZ 828](#) at [\[75\]](#).

<sup>5</sup> At [\[76\]](#).

*The default is deliberate*

[22] The failure to pay the amount ordered can only be described as deliberate. The fact that the defendants challenge the amount owing does not give them the right to simply not pay in the absence of a stay. While an application for a stay of proceedings has now been filed, there is no explanation for why it took five months from when they indicated they would file such an application, and the filing of the current proceedings, to prompt them into action.

[23] The companies submit that they are not in a financial position to pay the amount ordered. I will deal with that later in this judgment. However, I do not consider that this derogates from the deliberate nature of the actions or inaction of the defendants.

*The defendants do not have a track record*

[24] There is no evidence of WPL and WSL having appeared in the Authority or this Court previously for breaches of this nature. Accordingly, it is appropriate to treat them as 'first offenders' for the purposes of this assessment.

*Remediation*

[25] As already noted, WPL and WSL have only recently filed an application for a stay of both the initial determination and the compliance order. That application was not accompanied by a separate affidavit, but I would expect any supporting evidence would be consistent with what has been filed in relation to these proceedings. I have already noted that nothing has been paid into court to date.

[26] Mr Heath has made it clear that the challenge relates primarily to the quantum of the holiday pay. Despite accepting that some holiday pay is owed, it is common ground that nothing at all has been paid to Ms McKay by way of holiday pay.

[27] Accordingly, while the filing of the application is an appropriate step from a procedural perspective, the extensive delay and absence of any material action on the part of either company reduces the weight attributed to it as a remedying factor.

[28] The evidence on the extent to which there have been settlement discussions between the parties is disputed. It is

common ground that any proposals were put forward on a global basis, that is including all outstanding issues, whereas Ms McKay wants to deal with the outstanding holiday pay matters separately from relationship property and care of children issues. Her position is entirely appropriate, given that the order from the Authority relates to minimum standards owed by the companies and cannot be compromised. Ms McKay says nothing has been offered to her by way of holiday pay and I accept her evidence.

#### *The circumstances of the employer including financial circumstances*

[29] The defendants have provided limited financial accounts for the year ending March 2021. WPL is in a profit-making situation, albeit that profit is reduced from previous years. On the records provided to the Court, WSL is also making a small profit. The Court was not provided with balance sheets. While I appreciate that the cashflow situation may be difficult, on the information the Court has before it, it is apparent that the companies, and in particular WPL, are in a position to pay a fine.

[30] I note that Mr Heath has said that the companies are not in a position to pay the entire amount outstanding to Ms McKay. If that is the case, it is all the more reason why funds should have been paid into court or other arrangements made although, as I have noted above, on the evidence available both companies are operating at a profit.

#### *The circumstances of the employee including financial circumstances*

[31] Ms McKay has deposed that she earns between \$400 and \$450 per week in her current employment. The sum of \$57,334.24 is significant to her and she says she is badly in need of it. I accept this evidence.

#### *Deterrence*

[32] In the circumstances that I have outlined, I consider that there is a need to impose a sanction on WPL and WSL to deter them from further breaches of Authority orders. It is also appropriate to take into account general deterrence to underline that

such orders must be obeyed, or appropriate steps taken to stay such orders within reasonable timeframes.

#### **The fine**

[33] The maximum fine is \$40,000. I have considered the range of fines recently imposed under [s 140\(6\)](#) of the Act, as set out in the decision of this Court in *Cooper v Phoenix Publishing Ltd*,<sup>6</sup> as well as the decision of the Court of Appeal in *Peter Reynolds Mechanical Ltd v Denyer*.<sup>7</sup>

[34] In *Peter Reynolds* the Court of Appeal imposed a fine of \$750 but the circumstances of that case are different from the present. When it came to the level of that fine, the Court of Appeal took into account that the employer had remedied the breach before a sanction was considered. I do not consider that the companies in this instance have, by the late filing of an application for a stay with no supporting documentation or payment into court, remediated the breach. The filing of the application is not the same as having paid the amounts outstanding, as occurred in that case. Further, the companies accept that some amount is payable to the defendant, and yet have made no efforts to pay anything 'on account'.

[35] In looking at the cases referred to in the decision of this Court in *Cooper v Phoenix Publishing Ltd*, the Court notes that those cases illustrate that where an employer is in breach but has taken no steps to address the breach, and there is no issue about capacity to pay or history of previous breaches, the fines start at approximately

\$10,000. Those cases which have resulted in lower fines involved attempted remediation by the defendant or at least reasonable efforts to remediate the breach.

[36] In this case, it would be going too far to say that the defendants have remediated the breach. They have now taken steps from a procedural perspective to deal with the proceeding through the filing of their application for a stay. The outcome of the application is, of course, yet to be determined. However, the delay is such that it may render any determination of the stay application a nullity. I also note that most

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

<sup>7</sup> *Peter Reynolds Mechanical Ltd v Denyer*, above n 4.

applications for stay in this Court require payment into court or other suitable arrangements.

[37] Mr Towner has submitted that a fine of \$20,000 is appropriate. While I consider that the breach was deliberate, ongoing, and arguably contemptuous of the Authority's orders, a challenge was filed within time and, although delayed and in breach of timetabling orders, an application for a stay of proceedings has now also been filed.

[38] Taking into account previous orders of this Court, it is appropriate that the fine is less than \$10,000. I consider a fine of \$8,000 is warranted.

[39] There are two companies against which the order of holiday pay stands. I do not consider it appropriate to issue a penalty on a joint and several basis. Accordingly, I have split the fine, taking into account the financial situations of the respective companies.

[40] [Section 140](#) allows me to order that part of the fine be paid to Ms McKay. Taking into account the fact that she has borne the burden of having to make this application, and that it has clearly been distressing and inconvenient for her, I consider it is just to order that the fine be paid to her to go some way towards offsetting the difficulties she has faced. I note that the companies are agreeable to this course of action.

## Outcome

[41] The following orders are made:

- (a) Wanaka Pharmacy Ltd is ordered to pay a fine of \$6,000, the whole of which is to be paid to Ms McKay within seven days; and
- (b) Wanaka Sun (2003) Ltd is ordered to pay a fine of \$2,000, the whole of which is to be paid to Ms McKay within seven days.

## Costs

[42] Costs have been sought in this matter. Ms McKay has been successful, and costs should follow the event. The parties had agreed previously that this matter should proceed on a 2B basis.

[43] If the parties cannot agree on costs, submissions should be made in writing within 10 days of the date of this judgment.

Kathryn Beck Judge

Judgment signed at 4.50 pm on 27 May 2021