



# Employment Court of New Zealand

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## RPW v H [2018] NZEmpC 120 (11 October 2018)

Last Updated: 19 October 2018

IN THE EMPLOYMENT COURT  
AUCKLAND

[\[2018\] NZEmpC 120](#) EMPC 250/2018  
EMPC 265/2018

IN THE MATTER OF	applications for the Court to exercise powers under s 138(6) and s 140(6) of the <a href="#">Employment Relations Act 2000</a>
BETWEEN	RPW Plaintiff
AND	H First Defendant
AND	C Second Defendant

Hearing: 24 September 2018 (Heard at Auckland)  
Appearances: S Hood and Erin Anderson, counsel for plaintiff  
First defendant in person and on behalf of second defendant  
Judgment: 11 October 2018

### JUDGMENT OF JUDGE M E PERKINS

#### Introduction

[1] This judgment covers two sets of proceedings seeking remedies for alleged breaches of compliance orders and orders prohibiting publication. The plaintiff is a trust board. The first defendant and his corporate entity, the second defendant, act as employment advocates. The defendants acted as advocates for a former employee of the plaintiff in an employment relationship problem between them. The problem was referred to mediation. A settlement was reached and affirmed by the mediator pursuant to [s 149](#) of the [Employment Relations Act 2000](#) (the Act). It was a condition of the mediated settlement that neither party, being the plaintiff and the employee, nor their representatives shall make disparaging or negative remarks about the other. The first

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defendant agreed in writing to sign the record of the mediated settlement to indicate his agreement to being bound to it. He so signed accordingly.

[2] Following the settlement being effected with the employee, it is alleged that the defendants, through social media, posted disparaging comments about the plaintiff employer. This breached confidentiality, which was and is to be maintained in respect of the settlement agreement. As a result of the alleged breaches, the plaintiff applied to the Employment Relations Authority (the Authority) for compliance orders against the defendants pursuant to [s 151](#) of the Act. In addition, orders were sought from the Authority prohibiting publication of the names of the parties.

[3] Following the making of a series of determinations by the Authority granting compliance orders and orders prohibiting

publication, the plaintiff now alleges that the defendants have breached those compliance orders and the orders prohibiting publication of names. As a result, the plaintiff has filed two sets of proceedings with the Court pursuant to [s 138\(6\)](#) of the Act, applying to the Court to exercise its powers under [s 140\(6\)](#) of the Act.

[4] [Section 138\(6\)](#) reads as follows:

(6) Where any person fails to comply with a compliance order made under [section 137](#), the person affected by the failure may apply to the court for the exercise of its powers under [section 140\(6\)](#).

[5] [Section 140\(6\)](#) of the Act reads as follows:

(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.

[6] In this case, the defendants have not challenged the decisions of the Authority making the compliance orders or orders prohibiting publication. The issue for the Court to decide is solely whether the defendants have acted in breach of the orders and if so, what penalties should be imposed.

### **Procedural sequence**

[7] When the first set of proceedings was filed on 24 August 2018, the plaintiff applied for urgency. Accompanying the proceedings was a without notice interlocutory application for an interim order prohibiting publication of the plaintiff's name. This was supported by a lengthy affidavit from a representative of the plaintiff. In a minute dated 24 August 2018, the application for urgency was granted. In view of the circumstances disclosed in the supporting affidavit, an interim order was made, prohibiting publication of all the parties' names. A hearing date was set for 6 September 2018 to enable the defendants to appear before the Court if they wished to have the interim order reviewed and address the Court on the proceedings as a whole. In the minute, a time limit was set for the defendants to file a statement of defence. They failed to comply with that requirement, which expired at 4 pm on 31 August 2018.

[8] The defendants did not appear when the matter was called on 6 September 2018. By that date, the plaintiff had filed an amended statement of claim in the first set of proceedings. In view of the fact that breaches of a further compliance order of the Authority were alleged to have occurred, a second set of proceedings had also been filed, again seeking urgency. An oral judgment was given at the Court hearing on 6 September 2018.<sup>1</sup> In the oral judgment, urgency was granted. There was an order extending the interim non-publication order until further order of the Court. A time limit was set so that the defendants were required to file statements of defence to the amended statement of claim in the first set of proceedings and the statement of claim

<sup>1</sup> *RPW v H* [2018] NZEmpC 103.

in the new proceedings on or before 4 pm on 14 September 2018. There was an order that both sets of proceedings be heard together.

[9] In order to assist the defendants, a registry officer of the Court sent a statement of defence template form to the first defendant. The first defendant was also advised of the free advice service run by the Auckland Community Law Centre for the assistance of litigants in employment matters.

[10] The defendants failed to file statements of defence as directed. The first defendant filed an undated document on 14 September 2018 headed "Right to Justice". This could not be regarded as a statement of defence. It did not address the plaintiff's pleadings. It had a number of documents attached of no relevance to the plaintiff's pleadings. It failed to comply with the requirements for a statement of defence pursuant to reg 20 of the [Employment Court Regulations 2000](#) (the Regulations). It could not have informed the plaintiff or the Court of the basis for a defence if the defendants were intending to raise one. Indeed, the documents attached confirmed the breaches and the defendants' intention to continue to do so. It

seemed to be directed more at the basis upon which the Authority had made the compliance orders in the first place. As indicated, the defendants have not challenged the determinations of the Authority. The time for doing so has now expired.

[11] In view of the fact that the defendants had not taken appropriate steps in the proceedings by the time specified by the Court, the plaintiff's proceedings were set down for formal proof. The oral judgment dated 6 September 2018 had advised the parties that the matter would proceed by way of formal proof if no steps were taken by the defendants.

[12] A hearing date was allocated. The notice of hearing was given to the defendants even though, technically, in view of their default, they were not entitled to be informed of the date. The notice of hearing was directed to be given to them in the hope that if they appeared, they might be willing to give an unconditional undertaking to cease their breaches of the compliance and prohibition on publication orders. Alternatively, they could have indicated to the Court that they were seeking an extension of time for filing statements of defence and leave to do so. It was also hoped that in the face of

the matter proceeding to a hearing, the defendants might procure legal representation. The first defendant appeared at the hearing, representing himself and the second defendant. He was not willing to give any unconditional undertaking and indicated that he did not intend to seek leave to file statements of defence out of time. He did maintain that he had filed a statement of defence. In that respect, he was referring to the document which he had filed with the Court on 14 September 2018. The first defendant indicated that he had previously appeared in the Court. It was my view that he understood the procedures of the Court and knew what was required, but had deliberately decided not to file proper pleadings.

[13] At the hearing set for the formal proof, I issued a ruling that because of their default, the defendants were not entitled to be heard further, and I proceeded to hear evidence from the plaintiff. The first defendant remained at the back of the Court with his supporters during the course of the evidence.

### **The Authority's determinations and compliance orders**

[14] The first determination dated 27 July 2018 granted an order prohibiting publication of the parties' names or any information which might lead to their identification. On 13 August 2018, there was a further determination lifting the prohibition on publication only so far as it related to the names of the defendants. The earlier determination prohibiting the publication of the plaintiff's names was confirmed.

[15] On 16 August 2018, the Authority made the first of its determinations granting the plaintiff's application for compliance orders. That determination set out lengthy reasoning considering not only the application for compliance orders, but matters which had been raised by the defendants in opposition. Eventually, the Authority resolved that compliance orders were necessary to ensure that the defendants observed the non-disparagement clause contained in the s 149 settlement. The existing disparaging and/or negative remarks that the defendants had placed on social media were to be removed, and there was an order that they refrain from repeating their disparaging and/or negative comments that they had made about the plaintiff. Time

limits were set for the removal. The nature and content of the breaches which led the Authority to make compliance orders are well enunciated in the determination.

[16] The consequences of failure to comply and in particular, that an application could be made to the Court to exercise its powers under s 140(6) of the Act, were set out in the determination.

[17] On 27 August 2018, in the face of further breaches by the defendants, the Authority issued a further determination, ordering that the defendants comply with the earlier orders of the Authority prohibiting publication of the plaintiff's name. Again, this determination contained lengthy reasoning and considered all matters that were put to the Authority by the plaintiff in support. The defendants do not appear to have participated in the investigation meeting conducted in respect of the plaintiff's application. Nevertheless, out of an abundance of caution, the Authority Member considered matters which had been raised earlier by the defendants in opposition to orders prohibiting publication of names. The compliance order made on 27 August 2018 was to the effect that the defendants were to comply with the Authority's non- publication order contained in the determination dated 13 August 2018 with immediate effect. That was the order prohibiting publication of the plaintiff's name or any information leading to the identification of the plaintiff.

### **Formal proof evidence**

[18] The evidence relied upon by the plaintiff to prove the breaches of the compliance orders and the orders prohibiting publication is contained in three affidavits. All affidavits are sworn by the plaintiff trust board's chairman. The first affidavit sworn and filed on 24 August 2018 was in support of the original application for interim orders prohibiting publication of names. Two further affidavits were sworn and filed following the amended statement of claim being filed in the first set of proceedings and the filing of the second set of proceedings. The first of those affidavits was sworn on 20

September 2018. The second affidavit was sworn on 24 September 2018. Originals of both affidavits were filed with the Court on 24 September 2018. At the hearing, the deponent of the affidavits was called as a witness and confirmed the contents of the affidavits as being true and correct.

[19] The documents which are attached to the affidavits consist mainly of copies of posts by the defendants on social media and include responses from supporters of the defendants. Copies of correspondence to third parties from the defendants have been posted. The posts contain extensive comments which are not only disparaging but could be described as abusive. The comments are directed not only at the plaintiff, but also the Member of the Authority who issued the determination. Some comments are directed at the Court. Some correspondence shows an attempt by the defendants to interfere with the plaintiff's funding from its main funding provider. The evidence produced shows a continuation of the behaviour which led the Authority to make the compliance orders. The order to remove the material was ignored by the defendants. To set out the comments in detail in this judgment would be counter-productive because the effect of doing so, even with anonymisation, would provide information likely to identify the parties and compound the breaches.

[20] The documents attached to the affidavit set out widespread breaches of the conditions of the settlement agreement by disparaging the plaintiff. There is direct naming of the plaintiff on social media and other comments made in circumstances where it clearly connects the plaintiff to the proceedings. The defendants' language and context of the posts show brazen, intentional breaches of the compliance orders by the defendants. The information discloses a crusade embarked upon by the defendants against the plaintiff. The breaches appear to be being worn by the defendants almost as a badge of honour.

[21] The evidence leaves me sure that the compliance orders of the Authority have been breached by the defendants on numerous occasions.

[22] The crusade embarked upon by the defendants is aimed at workplace bullying, which is known to be a difficult problem existing in workplaces in New Zealand.<sup>2</sup> While the defendants might be commended for the energetic advocacy they have embarked upon on behalf of bullied employees, the effectiveness of the crusade has been compromised by the defendants' inappropriate behaviour in this case. As

2. Michael O'Driscoll and others "Workplace bullying in New Zealand: A survey of employee perceptions and attitudes" (2011) 49 Asia Pac J Hum Resour 390.

indicated in the earlier judgment of the Court, the actions of the defendants have put the benefit which their clients obtain, and particularly the client in this case, at risk.

[23] The modus adopted by the defendant in their attacks on the Authority Member and the Court seems to be that, when there is any development in the proceedings which is disadvantageous to the defendants, disparaging comments are made. Leading up to and following the first determination issuing compliance orders, attacks made on the Authority Member by the defendants and responses to their social media posts could only be described as despicable and reprehensible. The defendants did not take down supporting comments from supporters whose posts were clearly uninformed and ignorant.

[24] Having perused and considered the affidavits and the large numbers of exhibits at length, I have no reasonable doubt that the defendants have breached the compliance orders. The plaintiff is entitled to have the Court consider the remedies under s 140(6) of the Act.

### **Remedies pursuant to s 140(6) of the Act**

[25] Draconian penalties are provided under s 140(6) of the Act. In this case, as already indicated, the defendants have not filed a defence and have not challenged the determinations of the Authority granting compliance orders. Under the section, the defendants may be fined or imprisoned or their property sequestered. Before imposing any of these penalties, the Court would need to give the defendants the opportunity of being heard now that their liability for breach of the compliance orders has been determined. I am not sure that the first defendant fully understands the predicament he and his company, the second defendant, face. As I have indicated, his conduct, having regard to the potential interests of his clients, is misguided. The settlement which the defendants have managed to procure on behalf of the client involved in this case shows their effectiveness as advocates. However, they have undermined that situation by embarking on a widespread breach of the fundamental terms of the settlement their client has procured. The settlement effected with the plaintiff was clearly on the basis of an exchange of undertakings. In that context, the breaches of the defendants were inappropriate.

[26] I propose to adjourn the matter for several days to enable the defendants, and the first defendant in particular, the opportunity to reflect and decide whether or not to remedy the position. During that period, I would expect the defendants to cease all further disparagement of the plaintiff, the Authority Member and the Court. I would also expect the defendants to take down from their social media all references to the plaintiff, the Authority and the Court and anything relating to these proceedings. This is to include comments placed by supporters. If those actions are now taken by the defendants then I would regard that as a mitigating factor. In turn, that would potentially reduce the extent or quantum of any penalties imposed by the Court pursuant to s 140(6) of the Act.

[27] Accordingly, the matter will be called in the Employment Court at Auckland at 11 am on 24 October 2018 to enable the defendants to make representations to the Court on the issue of remedies. Counsel for the plaintiff have already made submissions in that respect, but at the hearing, they will also be given the opportunity of reply. I have already given an indication at the formal proof hearing on 24 September 2018 that in all the circumstances, I would not be prepared to consider imprisonment.

[28] There will now be a permanent order prohibiting publication of the names of the parties or any information likely to lead to their identification. By the very nature of the circumstances upon which the proceedings are founded, the need to prohibit publication in this case outweighs any legitimate interest the public may have in knowing the identity of the parties. Refusing to prohibit publication on the grounds of the need for open justice would simply compound the damage suffered, and continuing to be suffered, by the plaintiff as a result of its legitimate causes against the defendants.

[29] Costs are reserved.

Judgment signed at 4 pm on 11 October 2018

M E Perkins Judge

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