

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2012] NZEmpC 16
ARC 87/11**

IN THE MATTER OF an application for compliance order

BETWEEN BRIAN MOXEY
 Plaintiff

AND WESTMINSTER PACIFIC (NZ)
 LIMITED
 Defendant

Hearing: 8 February 2012
 (Heard at Auckland)

Counsel: Carl Blake, counsel for plaintiff
 No appearance for the defendant

Judgment: 8 February 2012

ORAL JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The plaintiff has applied for orders under s 140(6) of the Employment Relations Act 2000 in relation to the alleged failure of the defendant, Westminster Pacific (NZ) Ltd (WPNZ) to comply with an earlier compliance order made by the Employment Relations Authority dated 3 June 2011.

[2] The plaintiff seeks orders that the defendant be fined \$40,000 together with an order for costs relating to this application. The plaintiff had initially sought an order for sequestration of the defendant's property, but that was not pursued at the hearing.

[3] The background to this proceeding is conveniently set out in an affidavit of Mr Moxey, filed in support of the application. The plaintiff commenced employment with WPNZ on 1 April 2008. Issues subsequently arose and he filed a grievance with the Authority claiming unjustified constructive dismissal. The Authority member determined that the plaintiff had been unjustifiably constructively dismissed following an investigation meeting which the defendant attended through Mr Mann. The Authority awarded the defendant \$16,285.65 gross by way of non-payment of wages, \$18,000 gross in respect of contractual notice, \$4,828.97 gross in respect of accrued and annual leave entitlement and compensation of \$5,000 for hurt and humiliation.¹

[4] It is apparent from the plaintiff's affidavit that numerous steps were taken to extract the sums ordered by the Authority from the defendant. Several letters were sent. No payment was forthcoming. The plaintiff then applied to the Authority for a compliance order. The defendant did not attend the investigation meeting but it is clear that the defendant was aware of it. This is referred to in the Authority's determination² dated 3 June 2011 which records that Mr Mann, director of WPNZ, had sent an email to the Authority claiming that WPNZ had ceased trading, was to be removed from the Companies Register and that there were no funds available to WPNZ from which to make payment to Mr Moxey. The Authority Member went on to note that Mr Mann had not produced any financial evidence to support WPNZ's claims of financial inability, but that Mr Moxey had produced evidence which substantiated that any action to remove WPNZ from the Companies Register had been suspended. The Authority was satisfied that the defendant had failed to comply with the terms of the Authority's order and considered it just in the circumstances to make an order requiring WPNZ to comply with the determination.

[5] A compliance order was accordingly issued in relation to the awards set out in the earlier determination, together with \$71.56 by way of the application fee. The Authority ordered that the defendant comply within a period of 14 days from the date of service of its determination on the defendant and drew to the defendant's

¹ AA 524/10, 23 December 2010.

² [2011] NZERA Auckland 239.

attention the strict nature of the obligation on him to comply with its orders, noting the Court's power to fine, sequester property and imprison for non-compliance.

[6] It is clear that the plaintiff, through his lawyer, subsequently wrote to the defendant seeking compliance with the Authority's compliance order. No response was received.

[7] Where any person fails to comply with a compliance order made under s 137 (which relates to orders made by the Authority), the person affected may apply to the Court for the exercise of its powers under s 140(6).³ Amongst other things, s 140(6) empowers the Court to order the person in default to be sentenced to imprisonment for a period not exceeding three months, to be fined a sum not exceeding \$40,000 and/or to order that the property of that person in default be sequestered. Prior to exercising such power, the Court must be satisfied that the person has failed to comply with the compliance order made under s 137.

[8] I am satisfied that this proceeding has been properly served on the defendant, having regard to the contents of Ms Downs' affidavit dated 19 January 2012. The defendant has taken no steps in this proceeding to oppose the application. I caused the Registrar to call the name of the defendant but there was no appearance by the defendant today. It is just to proceed in the absence of the defendant.

[9] The onus is on the plaintiff to establish beyond reasonable doubt the grounds on which he relies for the imposition of a penalty: *Fletcher Development & Construction Ltd v NZ Labourers IUOW & Ors*.⁴

[10] I am satisfied that the Authority's order complies with the statutory obligations placed on the Authority when issuing such orders. I am also satisfied, based on the material before me, that the defendant has failed to comply with the orders of the Authority.

³ Refer s 138(6).

⁴ [1988] NZILR 954 at 960.

[11] There is limited material in relation to the defendant's financial position although I am advised that the status quo remains the same as it was at the time of the Authority's compliance determination. The company remains listed, although not trading. As counsel for the plaintiff points out, the defendant has taken no steps to explain or justify its failure to comply with the Authority's order, even if it had sought to claim that it could not pay the monies owing by reason of impecuniosity it has not done so. In *Ingham v August Models and Talent Ltd*,⁵ Chief Judge Colgan observed that he would have expected the defendant to have made contact with the plaintiff, or the Court or Authority, to explain the position and seek to make arrangements to honour its obligations. A fine was imposed in that case and that part of the application that sought orders of sequestration was adjourned for the necessary paperwork to be completed.

[12] I am not aware of any previous breaches by the defendant and accordingly I treat it as a first offender.

[13] A maximum fine may be imposed of \$40,000. A fine may be combined with other measures, including imprisonment. The suite of sanctions available to the Court reinforces the seriousness with which a refusal to comply with Authority orders is to be treated. Failure to comply with orders of the Authority raises public interest considerations and brings the administration of justice into disrepute. As the Employment Court observed in *August Models*:⁶

[14] Parliament has determined, by both setting the maximum fine at \$40,000 and allowing it to be combined with other sanctions in a suite of other measures, that refusals to comply with Authority orders are to be treated seriously.

[15] I am satisfied, beyond reasonable doubt, that the defendant has breached the Authority's order, and that this is an appropriate case for a penalty. Counsel for the plaintiff urged me to impose the maximum fine available, namely \$40,000. He submitted that this was appropriate given the defendant's deliberate flouting of the Authority's orders and the ongoing avoidance of the defendant's obligations to the

⁵ [2010] NZEmpC 157.

⁶ At [9].

plaintiff. While I do not doubt that these are relevant considerations in determining appropriate quantum, it is also necessary, in my view, to consider other factors, including the range of fines imposed by the Court in analogous cases and the individual facts of this case together with the defendant's situation insofar as that can be determined on the material before the Court. I take into account the apparent position of the defendant in considering the amount of any fine to be imposed. I also take into account the ongoing and lengthy failure of the defendant to meet its legal obligations to the plaintiff.

[16] Reference was made in support of a full fine to a decision of Judge Perkins in *Broeks v Peter Ross t/a Peter Ross Contracting*,⁷ and the Chief Judge's observations in *August Models*. In *Broeks*, Judge Perkins fined the defendant the sum of \$1,000. In *August Models*, the Chief Judge fined the defendant \$10,000, noting that it was a first offender.

[17] I have not been referred to any case in which a fine of \$40,000 has been imposed and do not consider it appropriate in the circumstances of the case before me, including the fact that the defendant appears to be a first offender.

[18] In the circumstances, I consider that a fine in the sum of \$8,000 is appropriate. I consider it appropriate in the circumstances that a proportion of that fine be paid to Mr Moxey as sought on the plaintiff's behalf. I refer to, and adopt, the reasons set out in the judgment of Judge Perkins in *Broeks* on this point.

[19] The sum of \$8,000 is to be paid by the defendant into Court and by the Court into the Crown bank account. I direct that half of the penalty recovered is to be paid to Mr Moxey. The plaintiff is entitled to recover the filing fee on this application and to a contribution to his legal costs in prosecuting the matter in this Court. I direct that the defendant pay costs to the plaintiff of \$800 together with the filing fee of \$306.67.

⁷ AC 36A/09, 11 December 2009.

[20] A copy of this judgment must be served on the defendant no later than 14 days from the date of it. It goes without saying that the defendant remains obliged to comply with its legal obligations as expressed in the Authority's compliance order. I urge the defendant to comply with those orders.

Christina Inglis
Judge

Oral Judgment delivered at 2.58pm on 8 February 2012