

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2012] NZEmpC 24
ARC 101/11**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN TRUDY BUTTERWORTH
Plaintiff

AND TBA COMMUNICATIONS LIMITED
Defendant

Hearing: 9 February 2012
(Heard at Auckland)

Counsel: Mark Ryan, counsel for plaintiff
Gretchen Stone, counsel for defendant

Judgment: 17 February 2012

JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The plaintiff challenges a compliance order¹ issued by the Employment Relations Authority (the Authority) in relation to an earlier costs award² against her. The challenge is brought on a de novo basis. There is some urgency attaching to these proceedings as the plaintiff is required, in terms of the compliance order made by the Authority, to make payment of the outstanding amount by 14 March 2012 (no application for stay of those orders having been filed).

Background

[2] The original costs determination of the Authority followed a personal grievance brought by the plaintiff against the defendant, together with an application for interim reinstatement. No issue has been taken with the quantum of that award.

¹ [2011] NZERA Auckland 540.

² [2011] NZERA Auckland 258.

No time limit for payment was set by the Authority for payment of costs, and nor was there any express requirement that the amount be paid in a lump sum. These are matters that the plaintiff seeks to make something of, and which are dealt with below.

[3] It is apparent from the affidavit evidence filed in these proceedings that, despite a request that payment be made, the plaintiff failed to do so. The defendant then filed an application with the Authority for a compliance order, pursuant to s 137 of the Employment Relations Act 2000. It is common ground that the plaintiff made a substantial payment towards satisfying the costs award on 3 November 2011 of \$1,800. She then set up an automatic payment system, at a rate of \$30 per week.

[4] In its determination of 20 December 2011, the Authority found that "...it is implicit that [costs] orders are to be met within a reasonable period."³ The Authority member observed that it appeared that the plaintiff intended to pay and had made instalments, while noting that this would take a number of years to discharge the debt.⁴ The Authority also recorded that no further or better particulars had been supplied by the plaintiff about her financial circumstances than those before the Authority when it had considered the issue of costs in June.⁵

[5] The Authority accepted that the defendant considered the rate of payment was too low in the circumstances and determined that it was reasonable to issue a further order.

[6] The Authority ordered the plaintiff to pay the defendant the full balance of costs as at the date of its determination by 14 March 2012 pursuant to s 137. The Authority also ordered the plaintiff to pay costs on the application of \$375 and disbursements of \$71.56.

³ At [2].

⁴ At [2]. The Authority's determination refers to instalments of \$30 per fortnight. It is common ground that the payments are being made at a rate of \$30 per week. Counsel for the defendant clarified that the Authority had proceeded on information provided to it, the defendant believing erroneously that the payments were being made fortnightly, rather than weekly.

⁵ At [3].

[7] The plaintiff contends the Authority had no jurisdiction to issue a compliance order against the plaintiff in the circumstances. The plaintiff bases this argument on a submission that she was complying with the order that had been made, by having made a lump sum payment and by continuing to make payments by way of weekly instalments.

[8] The plaintiff seeks an order setting aside the Authority's compliance order and that it be declared a nullity. The plaintiff also seeks costs in relation to her challenge.

[9] The defendant submits that the plaintiff failed to comply with the Authority's costs determination which, it says, while not expressly setting a timeframe for payment, impliedly did so and that the plaintiff was required to make payment within a reasonable period. The defendant submits that, at the current rate, it will take the plaintiff some four years to satisfy the costs award and that that is not reasonable. The defendant seeks indemnity costs, both in relation to the Authority's compliance order determination and in this Court.

Discussion

[10] Section 161(1)(n) of the Act confers jurisdiction on the Authority to make compliance orders under s 137. Section 137(1)(b) provides that the Authority may order compliance with any order, determination, direction, or requirement made or given by the Authority. The power contained within s 137 may be exercised where any person has "not observed or complied with" any such order or determination.⁶

[11] Counsel for the plaintiff submits that s 137 was not engaged because the plaintiff *was* complying with the Authority's earlier costs award. It is submitted that the power to order compliance only arises where there has been an established failure to comply. Counsel goes on to submit that the Authority erred in finding that there was an "implied" term that any payment would be made within a reasonable timeframe. That, he contended, involved reading words into the statute.

⁶ Section 137(1).

[12] Ms Stone, on behalf of the defendant, made the point that once a judgment has been sealed it becomes an undisputed debt and judgment proceedings can be commenced in relation to it. She submitted that important public policy issues arise and that adopting the interpretation advanced on behalf of the plaintiff would cut across cl 15 of schedule 2 of the Act. That provision contains the Authority's power to vary or alter any order in relation to costs. This, Ms Stone submitted, provides the route by which any difficulties are to be raised in relation to meeting costs awards that cannot otherwise be dealt with by agreement between the parties in terms of satisfying a costs order of the Authority.

[13] Neither counsel was able to identify any relevant authorities. The plaintiff's argument appears to be a novel one.

[14] Whoever has the benefit of a judgment is entitled to the fruits of it, unless the opposing party can show that, absent a stay, any right of appeal would be rendered nugatory or there would be the likelihood of a substantial miscarriage of justice. In *Duncan v Osborne Building Ltd*⁷ the respondent had successfully applied for summary judgment against the appellant. The respondent then issued a writ of sale in respect of the appellants' house. The judgment sum was not expressed to be payable within a specified timeframe.⁸ An appeal against summary judgment was filed and an application for stay declined. The Court of Appeal held that without an order for stay, a judgment may be enforced.⁹

[15] In the present case, the Authority ordered the plaintiff to pay \$9,000 in costs. While a date was not stated, it cannot be correct that the plaintiff had an indefinite time to pay. Mr Ryan accepted that the effect of the argument he was advancing was that the plaintiff could choose any timeframe for payment (such as in 20 years time) or, for example, to pay at a rate of 50 cents per week. Not only would the argument advanced on behalf of the plaintiff lead to absurd results (including that the defendant would effectively be required to act as banker for the plaintiff), but it would be contrary to the public interest, including by bringing the administration of justice into disrepute.

⁷ (1992) 6 PRNZ 85 (CA).

⁸ *Osborne Building Ltd v Duncan* HC Hamilton CP 68/91, 23 August 1991.

⁹ At 87.

[16] Nor is the plaintiff's argument consistent with the wording of s 137(1). The provision is expressed in the past tense: "has not observed or complied with". It does not use words indicating a present or ongoing state of affairs, such as a failure to take any or sufficient steps to meet the Authority's earlier order. The distinction between compliance and non-compliance (including attempts at compliance), was usefully discussed by Sir John Donaldson in *Howitt Transport Ltd and Anor v Transport and General Workers' Union* [1973] ICR 1.¹⁰ There he observed that:¹¹

Before leaving this matter, the members of the court would like to say a few general words about court orders, because some of the things that have been said today have led us to suppose that there may be a possible basis for misunderstanding. First, orders of any court must be complied with strictly in accordance with their terms. It is not sufficient, by way of answer to an allegation that a court order has not been complied with, for the person concerned to say that he "did his best". The only exception to that proposition is where the court order itself only orders the person concerned to "do his best". But if a court order requires a certain state of affairs to be achieved, the only way in which the order can be complied with is by achieving that state of affairs.

Non-compliance with a court order can have a wide range of qualities. It may, at the top end of the scale, consist of a flat defiance of the court's authority. Going down the scale, it may not amount to flat defiance, but rather to a passive ignoring of the court's order. Going down the scale still further, it may amount to a half-hearted or, perhaps, colourable attempt to comply with the court's order. And, at the bottom end of the scale, there may have been a genuine, whole-hearted use of the best endeavours to comply with the order, which nevertheless has been unsuccessful. In each case there is a breach of the court's order. In each case, to use the technicalities of the law, there is a "contempt of court". But the quality of the non-compliance varies over an enormous range. The penalties which will be imposed by this court for contempt will equally vary over an enormous range and will reflect the quality of the non-compliance. They will, in fact, reflect faithfully the court's view of the seriousness of the conduct of the person to whom the order was addressed.

(Emphasis added)

[17] Here, the terms of the Authority's costs order were clear, requiring the plaintiff to pay a stated figure. It was not qualified in any way by (for example) including that payment could be made at a rate of \$30 per week, or that the amount

¹⁰ Cited in *Railways Corporation v New Zealand Seamens IUOW and Evans* [1989] 2 NZILR 613 at 625.

¹¹ At 10-11.

ordered must be paid within four years of the date of the order. The plaintiff has failed to comply with the order that was made. She has made – and continues to make – attempts to meet the costs order. However, the quality of her non-compliance does not alter the fact of her breach.

[18] I agree with the submission advanced by counsel for the defendant that the statutory scheme tells against the interpretation advanced on behalf of the plaintiff. That is because the Act provides an avenue by which difficulties meeting any award might be dealt with. A party adversely affected by a costs order may apply to the Authority for variation of such an order under cl 15(2), Schedule 2.

[19] The effect of the costs order made in the Authority was to make that amount owing immediately, subject to any agreement the parties might otherwise have made between themselves in terms of the way, and timeframe, in which payment was to be made and absent any application for stay pending a challenge or application to the Authority for variation or suspension of its earlier order.

[20] However much had been paid by the plaintiff in the present case, she had not paid the full amount owing. There had, accordingly, been non-compliance with the clear terms of the Authority's order.

[21] I do not accept counsel's submissions that the Authority acted without jurisdiction. The plaintiff's challenge is dismissed.

Time payments?

[22] An issue arose as to whether the Court may order a judicially sanctioned payment regime even if the plaintiff failed in her substantive challenge. I do not consider that the position is clear cut. Section 138(4)(a) provides that a compliance order of the kind described in s 137(2) (under which the present order was made) may be made "subject to such terms and conditions as the Authority thinks fit". This general power may be taken to confer an ability on the Court on a de novo challenge to impose a time payment regime. However, s 138(4A) may present difficulties for such an analysis, given that it contains specific provision for payment by instalments

and is expressed to be limited in its application to payments to an employee and “only if the financial position of the employer requires it.” It may accordingly be that the general power to impose conditions contained within s 138(4)(a) is to be read subject to the express powers contained within s 138(4A), effectively excluding orders for payment by instalment by employees (such as the plaintiff), as opposed to employers.

[23] However, I do not find it necessary to reach a concluded view on the Court’s powers in this regard. That is because it is clear, on the evidence filed in these proceedings, that the plaintiff has a present ability to satisfy the order against her. She accepts that she has some \$38,000 held in a solicitor’s trust fund to which she has access. While her affidavit referred to the money in the account being used to meet expenses associated with her two sons’ education, counsel accepted on behalf of his client (and after taking instructions) that the plaintiff was able to access the money and to apply it to other ends.

[24] I have considered the plaintiff’s financial situation as detailed in her affidavit and it is clear from that material that, while she has a number of outgoings, she has additional money available to her out of which she would be in a position to meet the costs award and comply with the compliance order made against her. I put to one side the point advanced on behalf of the defendant that the plaintiff comes from a wealthy family. That may be so, but it does not assist me in determining what her individual financial circumstances may be.

[25] I note, for completeness, that the Chief Judge in a Minute put the plaintiff on notice that if a judicially sanctioned time payment scheme was to be pursued, full financial information ought to be put before the Court.

[26] Having considered the financial position of the plaintiff, as detailed in the evidence before the Court, I would not have been minded to sanction a time payment scheme even if I had been satisfied that there was the power to do so. That is because I am satisfied that she has sufficient financial resources to meet the debt owing by her by way of lump sum.

Costs

[27] The defendant seeks indemnity costs both in relation to the compliance order application and in respect of proceedings in this Court. The Authority awarded costs of \$375 and disbursements of \$71.56 to the defendant on its application for a compliance order.

[28] Issues were raised as to the extent to which a cross-challenge in respect of costs in the Authority was properly before the Court. The Court's Practice Direction¹² deals with cross challenges and makes it plain that a cross challenge need not be filed within the time for filing a statement of claim, and may be incorporated into a statement of defence to the statement of claim initiating the challenge. This is the procedure that was followed by the defendant in this case.

[29] Counsel for the defendant submits that the plaintiff's conduct supports an award of indemnity costs, referring in particular to the plaintiff's delay in dealing with the issue of costs. Reference was also made to two Calderbank offers that were (it is said) unreasonably ignored. Those offers were not before the Court and were, in any event, taken into account by the Authority in its costs determination of 17 June 2011. It is clear that the plaintiff delayed in addressing the issue of costs, prompting the defendant to apply for a compliance order in the Authority. It is also clear that the plaintiff's approach to the costs issue has been a source of significant frustration to the defendant.

[30] Indemnity costs are exceptional and require exceptionally bad behaviour: *Bradbury v Westpac Banking Corporation*.¹³ I do not consider, based on the material before me, that the plaintiff's conduct is sufficiently reprehensible to warrant indemnity costs being awarded against her in the Authority and the Court, and decline to do so. The defendant's challenge seeking indemnity costs in relation to the (successful) application for a compliance order and in this Court is accordingly dismissed.

¹² [2005] ERNZ 60.

¹³ [2009] NZCA 234, [2009] 3 NZLR 400 at [28].

Result

[31] The plaintiff's challenge to the jurisdiction of the Authority to issue a compliance order is dismissed.

[32] Even if I had been satisfied that this Court had the power to impose a time payment regime, I would not have done so in the circumstances and based on the evidence before me. It is clear that the plaintiff has the financial capacity to meet her financial obligations in full.

[33] The defendant's challenge to the Authority's costs determination on the compliance order application is dismissed.

[34] This challenge proceeded by way of a de novo hearing. Accordingly, the determination of the Authority is set aside pursuant to s 183(2).¹⁴ The plaintiff is ordered to pay to the defendant in full the balance of costs awarded outstanding as of the date of this judgment. The specified time within which this order is to be obeyed is 14 March 2012. The plaintiff is also ordered to pay to the defendant costs, which I consider appropriate, in the sum of \$375 and disbursements in the amount of \$71.56.

[35] The defendant is entitled to costs in relation to these proceedings. If the parties are unable to agree costs as between themselves, memoranda can be filed. The defendant will have 60 days from the date of this judgment to file and serve any such memorandum, with the plaintiff having a further 30 days.

Christina Inglis
Judge

Judgment signed at 3.45pm on 17 February 2012

¹⁴ See too *Norske Skog Tasman Ltd v Manufacturing & Construction Workers Union Inc* [2009] ERNZ 342 at [29] – [44].