

**IN THE EMPLOYMENT COURT
AUCKLAND**

**[2013] NZEmpC 159
ARC 52/13**

IN THE MATTER OF an application for compliance

BETWEEN LING LIN
 Plaintiff

AND SANYOU (SANDY) ZHOU
 Defendant

Hearing: 20 August 2013

Appearances: May Moncur, advocate for plaintiff
 No appearance for defendant

Judgment: 29 August 2013

JUDGMENT OF JUDGE CHRISTINA INGLIS

[1] The plaintiff has applied for orders under s 140(6) of the Employment Relations Act 2000 (the Act) in relation to the defendant's alleged failure to comply with an earlier compliance order made by the Employment Relations Authority (the Authority).¹ The plaintiff also seeks a compliance order in relation to non-payment of a costs award in this Court.

[2] The plaintiff brought a claim against the defendant relating to unpaid wages. The claim succeeded, for reasons set out in the Authority's substantive determination (dated 31 January 2012).² The Authority ordered the defendant to repay the sum of \$5,000 to the plaintiff under the Wages Protection Act 1983. The Authority also imposed a penalty of \$7,000, \$4,000 of which was to be paid to the Authority for payment into the Crown bank account, with the remaining \$3,000 to be paid by the defendant to the plaintiff directly.

¹ [2013] NZERA Auckland 124.

² [2012] NZERA Auckland 43.

[3] It is apparent from the Authority's determination that while the defendant took steps to meet her obligations in relation to the \$4,000 component of the penalty, she did not make the payment due to the plaintiff. The Authority Member was satisfied, based on the material before him, and after hearing from both parties, that the defendant had had the opportunity to meet the obligations set out in the Authority's substantive determination and had failed, in the absence of any good reason, to do so. A compliance order was accordingly issued. The defendant was ordered to pay the plaintiff \$8,000 pursuant to s 137 of the Act within 30 days of the date of the Authority's determination.³

[4] The defendant commenced a challenge to the Authority's substantive determination.⁴ The plaintiff successfully sought interlocutory orders against the defendant and a costs award of \$1,000 was made against both Ms Zhou (the current defendant) and New Times Press Limited (the company).⁵

[5] The plaintiff gave evidence that she has taken a number of steps to obtain satisfaction of the Authority's awards, including by way of application to the District Court for enforcement orders. It appears that an attachment order to a Work and Income benefit that the defendant was said to be in receipt of, was made. However, the plaintiff subsequently received advice from the Ministry of Justice that Work and Income had advised it that the defendant's benefit was no longer current and that, accordingly, payments received through Work and Income would stop. That meant that the enforcement action taken through the District Court was ineffective. The plaintiff was advised of a number of alternative steps that she might take to recover the money owed to her.

[6] The plaintiff's evidence was that the defendant has done nothing to satisfy the Court's costs award and nor has she done anything to meet her obligations under the Authority's earlier awards, despite the Authority issuing a compliance order. Both remain outstanding.

³ As recorded in the Certificate of Determination, issued on 12 April 2013.

⁴ Together with New Times Press Limited, as second plaintiff.

⁵ [2012] NZEmpC 148 at [7].

[7] Under s 137 of the Act, the Authority may order compliance where there has been a failure to observe or comply with a determination of the Authority. The Authority must specify a time within which the order is to be obeyed (s 137(3)). Where any person fails to comply with the compliance order made under s 137, the person affected may apply to the Court for the exercise of its powers under s 140(6) (s 138(6)).

[8] 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 the person in default be sequestered. Prior to exercising such a power, the Court must be satisfied that the person has failed to comply with a compliance order made under s 137.

[9] The Court may also order compliance in respect of a failure to comply with any order made by the Court (s 139(1)). In such circumstances the Court must specify a time in which the order is to be obeyed (s 139(3)).

[10] The defendant was served with the statement of claim and notice of hearing, together with the Court's costs judgment and the Authority's determination granting a compliance order in the plaintiff's favour. The defendant has not taken any part in the current proceedings before the Court.

[11] I am satisfied that the Authority's compliance order satisfies the statutory obligations placed on the Authority when issuing such orders. I am also satisfied that the defendant has breached the Authority's order. I turn to consider whether this is an appropriate case for a sanction to be imposed, and if so, what the nature of such a sanction might be.

[12] As I have said, if the Court is satisfied that there has been a failure to comply with an order under s 137 it may impose a fine, a sentence of imprisonment, and/or order for the sequestration of property. In the statement of claim the plaintiff sought both a fine and a sentence of imprisonment. Ms Moncur made the point that the plaintiff has been put to a considerable amount of expense and trouble in seeking to

obtain the satisfaction of the awards made in her favour, and the defendant has been obstructive, including by transferring property to her sister following proceedings being issued, a step that Ms Moncur infers was taken by the defendant in order to avoid her legal obligations.

[13] 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 the orders of the Authority plainly raises public interest considerations and brings the administration of justice into disrepute. As the Chief Judge observed in *Ingham v August Models and Talent Ltd*:⁶

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. ...

[14] It is unclear, because the defendant has not participated in these proceedings despite having an opportunity to do so, why she has failed to take any steps whatsoever to comply with the Authority's orders. It may be that she faces financial difficulties and this would appear (at first blush) to be supported by a statement of means that was filed in the District Court in the context of the enforcement action taken against her. However the statement of means records the defendant's sole income as being a benefit. It appears from subsequent correspondence from the Ministry of Justice that she is no longer in receipt of a benefit. In the absence of evidence from the defendant herself it is difficult to draw any conclusions as to what her present financial position is, or was at the time the orders were made against her.

[15] I note that the Authority Member referred to the defendant's financial circumstances in his determination, but was unable to form a concluded view on the issue in light of the paucity of information supplied by the defendant in support of the submission that she had failed to meet her obligations because of financial constraints.⁷ The difficulties confronted by the Authority are compounded in this Court because the defendant has not taken an active role in these proceedings.

⁶ [2010] NZEmpC 157 at [9].

⁷ [2013] NZERA Auckland 124 at [7].

[16] It appears, on the basis of the material before the Court, that the defendant has simply ignored the Authority's orders and that she continues to do so. I conclude that this is an appropriate case for a sanction to be imposed on her.

[17] I am not aware of any case in which imprisonment has been ordered and would regard it as a sanction of last resort. The Act does not contain any specific provisions as to the circumstances in which imprisonment might be imposed or the process that would apply. This can be contrasted to, for example, the powers conferred on District Court judges to imprison for non payment of fines contained within s 88 of the Summary Proceedings Act 1957.⁸ Under that statutory scheme, where a fine remains unpaid a defendant may be brought before the Court for an examination of their means. Subject to s 106E, after considering the defendant's financial position and a report from the Registrar a judge may direct that a warrant of commitment be issued.⁹ However, the circumstances in which a warrant of commitment may be issued are constrained. Section 106E(7) provides that a judge shall not direct the issue of a warrant of commitment for the imprisonment of a defendant unless a number of factors are satisfied, including that the defendant has been given the opportunity for legal representation; that he/she is satisfied that a warrant of commitment can be executed immediately; and that he/she is satisfied that the defendant has the means to pay the fine.

[18] Plainly there are significant differences between the power to imprison for non payment of fines under the Summary Proceedings Act and the powers conferred on this Court under s 140(6) of the Act. However, I would be loathe to impose the draconian sanction of imprisonment in the absence of hearing legal argument as to the circumstances in which it might properly be imposed, including the process to be adopted to ensure that the rights and interests of the respondent are adequately safeguarded.

[19] In any event, I am not satisfied that a sentence of imprisonment would otherwise be appropriate in the circumstances of this case, including having regard to the fact that the defendant does not appear to have a history of failing to comply with

⁸ See, for example: *R v Eliu* [2008] NZCA 239; *Hadfield v Collections Unit Christchurch* HC Christchurch CRI-2008-409-125 15 August 2008.

⁹ Section 88AE(1)(b).

compliance orders issued by the employment institutions and the fact that the failure to comply with the Authority's compliance order can adequately be dealt with by less restrictive means, namely a fine.

[20] A fine at the maximum end of the scale (as sought on behalf of the plaintiff) is not realistic. In terms of the quantum of any fine, I consider that a range of factors are relevant, including the defendant's ongoing failure to meet or attempt to meet her legal obligations to the plaintiff or to take any steps in that regard. The reasons for her non compliance are unclear, as she has not participated in these proceedings. Her financial situation also remains opaque for the same reason.

[21] I have had regard to the range of fines imposed by the Court under s 140(6)(d). It appears that these range from \$1,000 to \$10,000.

[22] Standing back and considering all of the factors and on the information before the Court, I consider that a fine in the sum of \$3,000 is appropriate.

[23] I now turn to the application for a compliance order in relation to the failure of the defendant to pay the Court's costs award.

[24] The costs award was made against both the defendant and the company. The application for a compliance order is brought against the defendant. The defendant is jointly and severally liable in terms of the award. I am satisfied that she has failed to comply with the costs order made against her. In these circumstances I consider that a compliance order is appropriate.

[25] Pursuant to s 139 of the Act, Ms Sanyou Zhou is ordered to pay Ms Ling Lin the sum of \$1,000 within 30 days of the date on which this judgment is served on her by the plaintiff.

[26] Ms Sanyou Zhou must be served with a copy of this judgment forthwith. It is important for her to understand the potential consequences of a failure to meet the compliance order I have just made. The defendant can avoid the consequences of a further order under s 140(6) by meeting her obligations to the plaintiff in terms of the

costs award made against her. I would urge her to seek legal advice in relation to these matters. They cannot simply be ignored.

[27] The plaintiff is entitled to costs on the applications before the Court. I invite the plaintiff to file a memorandum, with supporting material, in relation to this issue within a period of 14 days of today's date.

Christina Inglis
Judge

Judgment signed at 11.30 am on Thursday 29 August 2013