IN THE EMPLOYMENT COURT
AUCKLAND

[2014] NZEmpC 135
ARC 46/14

IN THE MATTER OF	an application for penalty for breach of compliance order
BETWEEN	JAMES DENYER, LABOUR INSPECTOR Plaintiff
AND	PETER REYNOLDS MECHANICAL LIMITED TRADING AS THE ITALIAN JOB SERVICE CENTRE Defendant

Hearing: 24 July 2014
(Heard at Auckland)

Appearances: SM Carr, counsel for plaintiff
No appearance for defendant

Judgment: 24 July 2014

ORAL JUDGMENT OF CHIEF JUDGE G L COLGAN

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[1] This is an application for a fine to be imposed on the defendant for its failure to comply with a compliance order made by the Employment Relations Authority under s 137 of the Employment Relations Act 2000.

[2] There has been no appearance at today's hearing on behalf of the defendant. In these circumstances, I must be satisfied that the proceedings were brought to the defendant's notice and that the time for taking any step to defend them has expired.

[3] The defendant is an incorporated company, the registered office of which, according to contemporaneous Companies Office files, is care of Gary Morrison Limited, Accountants, 1st Floor, 171a Target Road, Glenfield, North Shore 0627. These proceedings were served by CourierPost on 13 June 2014 in accordance with

reg 28(2)(a)(iii) of the Employment Court Regulations 2000. No step has been taken by the defendant in the proceeding and the time for doing so has expired.

[4] By a determination issued on 3 October 2013,[1] the Authority required the defendant to pay $1,568.80 for unpaid holiday pay, interest on that sum at the rate of five per cent per annum from 22 October 2012 until the date of payment to the Labour Inspector, and reimbursement of the Authority's filing fee of $71.56. Although the defendant, through Mr Reynolds, did appear initially at the Authority's investigation and he was provided with an opportunity to supply the relevant wage and holiday records to the Authority and the Labour Inspector, Mr Reynolds did not do so and did not participate subsequently in the Authority's investigation.

[5] On 7 February 2014, the Authority issued a compliance order against the defendant in a determination,[2] requiring it to comply with the orders it had made on 3 October 2013 within seven days of 7 February 2014. The compliance order also required the defendant to reimburse the Labour Inspector for a further Authority filing fee of $71.56.

[6] There has been no subsequent participation for the defendant in the Authority proceedings.

[7] I am satisfied from the Labour Inspector's evidence in this Court that no attempt has been made by the defendant to comply with the Authority's compliance order issued on 7 February 2014. No explanation has been tendered either to the Court or to the Labour Inspector.

[8] Mrs Carr submitted that the Labour Inspector's evidence has met the high evidential burden of proof beyond reasonable doubt which was referred to by her Honour Judge Inglis in *Mozey v Westminster Pacific NZ Ltd.*[3] I agree that in this case the evidence meets that standard although I do not necessarily agree that the criminal standard of proof beyond reasonable doubt is that which is applicable to

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[1] *Denyer v Peter Reynolds Mechanical Limited t/a The Italian Job Service Centre* [2013] NZERA Auckland 460.
[2] *Denyer v Peter Reynolds Mechanical Limited t/a The Italian Job Service Centre* [2014] NZERA Auckland 43.
[3] *Mozey v Westminster Pacific NZ Ltd* [2012] NZEmpC 16 at [9].

these proceedings. Certainly proof on the balance of probabilities to a high standard commensurate with the seriousness of the allegations, and the possible consequences, is at least appropriate and, in the circumstances, it does not require a decision of the Court because that higher standard has been met if it is applicable.

[9] The relevant circumstances of the defendant known to the Labour Inspector are as follows.

[10] The business operated by the company as The Italian Job Service Centre in Glenfield appears to be a small-scale specialist motor vehicle servicing operation, essentially run by Mr Reynolds with perhaps one or two other employees, one of whom was the subject of the Labour Inspector's proceedings in the Authority for holiday pay arrears. The Labour Inspector's evidence is that the business is still operating. Mrs Carr confirmed that the defendant has not previously come to the notice of the Labour Inspectorate for any similar breaches of employment law or of the Holidays Act 2003 in particular and that no formal proceedings have ever been brought against the defendant or have resulted in formal orders against it. In those circumstances, I treat the defendant as one previously unknown to the Labour Inspectorate or the Authority or the Court.

[11] The maximum fine for non-compliance with an Authority compliance order is $40,000. Although the sum originally at issue in the Authority for arrears of holiday pay was relatively modest, the defendant's failure or refusal to meet its obligations in law is serious and has been sustained. As Mrs Carr pointed out, the defendant has been given several opportunities in the Authority, and by the Labour Inspector independently, to provide records and to otherwise meet its obligations but, having given the impression that it would do so, has failed or refused.

[12] The defendant's liability for the amounts ordered by the Authority to be paid by it remains, in addition to any penalty that this Court might impose.

[13] There is one other question that has been raised properly by Mrs Carr with which I should deal. Counsel has submitted that the Court should order a proportion of any fine imposed to be paid to the Labour Inspector to the use of the former

employee of the defendant. Counsel cited, in support of the jurisdiction to do so, a judgment of this Court in *Broeks v Ross t/a Ross Contracting*.[4] At [9] of that oral judgment delivered on 11 December 2009, his Honour Judge Perkins said this:

> … I order [the defendant] to pay a fine of $1,000, which is also to be paid to Mr Broeks and that sum can be added to the money which is now owing under the other orders. I consider that I have jurisdiction to order that the fine be paid to Mr Broeks. That cannot be done in the ordinary courts with criminal jurisdiction because of provisions of the Sentencing Act. But the Sentencing Act only applies to courts exercising criminal jurisdiction. As the jurisdiction of this Court is not within that category, and the Employment Relations Act 2000 does not impose any caveat as to where any fines are to be paid, I consider that in this case it is appropriate that the fine be paid to Mr Broeks.

[14] I have not had the benefit of argument on the point as I apprehend Judge Perkins did not in that earlier case. I have to say, however, that I entertain some doubts that his Honour is correct.

[15] It is true that s 140 of the Employment Relations Act does not specify to whom a fine for non-compliance with a compliance order is to be paid. The strong implication in those circumstances, however, is that the fine is payable to the Crown. I do not think it is a question that turns on the non-application of the Sentencing Act 2002 but, rather, on the interpretation of the Employment Relations Act. What adds to my concern, as a matter of interpretation of the Employment Relations Act, is s 136. At subs (2) Parliament has provided expressly that in the case of penalties imposed under the Employment Relations Act, the Authority or the Court may order that the whole or any part of any penalty recovered must be paid to any person. That is the provision that allows the Court and the Authority to direct the whole or any proportion of penalties to be paid to individual employees as Judge Perkins did in the *Broeks* case. It is at least arguable in my view, however, that by including an express provision such as s 136(2) in relation to penalties under the Employment Relations Act, Parliament did not intend the same provision to apply implicitly to fines under s 140. Had it done so, it is arguable that Parliament would have enacted a similar provision to s 136(2) in relation to s 140(6)(d). In those circumstances, I am loath to make an order about which I have jurisdictional doubts; but reiterate of course that the Authority's compliance order, which requires the holiday pay arrears to be paid

[4] *Broeks v Ross t/a Ross Contracting* AC36A/09, [2009] NZEmpC 128 (11 December 2009) at [9].

to the Labour Inspector, will be to the benefit of the employee concerned. This and the other question mentioned earlier about the burden of proof of such cases may be better dealt with by a full Court which can consider an appropriate case in future.

[16] I take, as a starting point for the level of a fine which is appropriate, one-quarter of the maximum. I propose to discount that a little because of the relatively modest sums involved, so that there is still a degree of proportionality between the fine and the monies owed by the defendant. Accordingly, the defendant is fined the sum of $8,000 pursuant to s 140(6)(d) of the Employment Relations Act. In addition, it must contribute to the plaintiff's costs of bringing this proceeding. Mrs Carr has suggested a figure of $250 which, as I commented at the time, seems modest and although I would have been prepared to have awarded three times that amount, I propose only to award what Mrs Carr has asked for. So there will be a requirement that the defendant contribute to the plaintiff's costs in the sum of $250 and must also pay the plaintiff the filing fee in this Court of $306.67.

GL Colgan
Chief Judge

Judgment delivered orally at 12.43 pm on Thursday 24 July 2014