

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND**

**I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKĀURAU**

**[2019] NZEmpC 153
EMPC 327/2019**

IN THE MATTER OF an application for sanctions under s 140(6)
 of the Employment Relations Act 2000

BETWEEN OLIVER SAVAGE
 Plaintiff

AND WAI SHING LIMITED
 First Defendant

AND FRANKLYN WAI SHING
 Second Defendant

Hearing: 17 October 2019
 (heard at Auckland)

Appearances: C W Stewart and W Fussey, counsel for plaintiff
 M Hammond and J Muggeridge, counsel for defendant

Judgment: 1 November 2019

JUDGMENT OF JUDGE B A CORKILL

Background

[1] Oliver Savage obtained an interim reinstatement order pending an investigation by the Employment Relations Authority of his claim that he was unjustifiably dismissed by Wai Shing Limited (WSL). This order was made on 2 September 2019.¹

¹ *Savage v Wai Shing Ltd* [2019] NZERA 511.

[2] Subsequently Mr Savage alleged that since WSL had not allowed him to resume the full duties of his position as Farm Operations Manager, a compliance order was warranted. On 20 September 2019, the Authority concluded WSL had not complied with the terms of the interim reinstatement order. It ordered WSL to do so by reinstating Mr Savage to his position as Farm Operations Manager.²

[3] Then, on 25 September 2019, Mr Savage brought a sanctions claim against WSL, asserting there had been breaches of the compliance order because he had still not been returned to full duties. The orders sought were a fine against WSL of \$40,000, and penalties, as well as a term of imprisonment against one of the directors of WSL, Franklyn Wai Shing, although he was not named as a defendant.

[4] After discussion with counsel on 26 September 2019, I timetabled the filing of an amended statement of claim and of affidavits to enable an early hearing to be held on 17 October 2019.

[5] Then, an amended statement of claim was filed for Mr Savage which clarified he was seeking a fine against WSL as first defendant, and a term of imprisonment against Mr Shing as second defendant.

[6] It emerged that the focus of the claim for sanctions was on events which occurred from 20 September 2019, when the compliance order was made by the Authority, until 28 September 2019, when Mr Savage suffered a muscle strain at work. He says that he then became temporarily absent from his role; and that he was due to return from medical leave on 21 October 2019.

Statutory framework

[7] The regime relating to compliance orders and their enforcement is found, for present purposes, in ss 137-140.

[8] Section 137 sets out the powers of the Authority to order compliance; the material provisions are ss 137(1)(b) and 137(2). These provide that, where any person

² *Savage v Wai Shing Ltd* [2019] NZERA 543.

has not observed or complied with an order made by the Authority, it may order a person to do any specified thing for the purpose of preventing non-observance or non-compliance with the relevant order of the Authority. Section 137(3) requires the Authority to specify a time within which the order is to be obeyed.

[9] Section 138 sets out more provisions in respect of compliance orders made by the Authority; s 138(6) is relevant to this case and reads:

...

- (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).

[10] Section 140 provides for sanctions where there is a breach of a compliance order. The relevant subsections read:

...

- (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.
- (7) An order under subsection (6)(d) may direct that the whole or any part of the fine must be paid to the employee concerned.

[11] Mr Savage's applications were brought under these provisions. The threshold question is whether the Court is satisfied that WSL and Mr Shing have failed to comply with a compliance order made under s 137. If so, the imposition of a sanction must be considered.

[12] In *Peter Reynolds Mechanical Ltd t/a The Italian Job Service Centre v Denyer (Labour Inspector)*, the Court of Appeal confirmed that background events may form part of the relevant context, for example, in determining the nature of the asserted default.³

[13] The principles relating to the exercise of the jurisdiction have been long established. In *Fletcher Development and Construction Ltd v New Zealand Labourers*, the Labour Court referred to the following general principles:⁴

- a) The standard of proof is beyond reasonable doubt; the onus for establishing this is on the applicant.⁵
- b) The first step is to ascertain the precise meaning of the compliance order, primarily by reference to the purpose for which the order was made.⁶
- c) While the Court has a wide discretion to admit evidence, an application of this kind must be supported by direct evidence against each person named.⁷

[14] In *Bamber v Air New Zealand Ltd*, a full Court held that, before anyone could be imprisoned for disobeying a court order, proof is necessary: that a court order has been made against that person; that the person was aware of its making and of its precise terms; that the order set out the person's obligations in adequately clear and exact ways; and that the person nevertheless defied the order or at least had neglected to comply with it.⁸

[15] I proceed on the basis of these principles.

³ *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)* [2016] NZCA 464, [2017] 2 NZLR 451, [2016] ERNZ 828 at [77].

⁴ *Fletcher Development and Construction Ltd v New Zealand Labourers* [1988] NZILR 954 (LC).

⁵ At 958.

⁶ At 960.

⁷ At 960.

⁸ *Bamber v Air New Zealand Ltd* EMPC Auckland AEC1/95, 1 February 1995 at 3; *ALA v ITE* [2019] NZEmpC 39, [2017] ERNZ 147 at [37]-[38].

Issues

[16] From the pleadings and submissions of counsel, the issues for resolution are:

- a) What did the terms of the compliance order require?
- b) Is the Court satisfied that either defendant breached the compliance order?
- c) If breaches are established, should sanctions be imposed?

[17] A preliminary point is that the hearing proceeded on the basis of a sequence of affidavits filed by the two witnesses, Mr Savage and Mr Shing. There was no application to cross-examine either witness.

[18] Mr Hammond, counsel for the defendant, submitted that the required standard of proof meant the Court would need to be “sure” of each element of the allegation being assessed.⁹ I accept this submission. That said, there is a significant degree of consensus as to the key events, although there are some particular areas of disagreement on which it will be necessary to comment.

[19] Before dealing with the issues I have identified, it is appropriate to set out the key facts.

Key facts

Interim reinstatement order

[20] In January 2019, Mr Savage commenced employment with WSL, a large horticultural company based in Pukekohe, as Farm Operations Manager, having relocated from the United Kingdom to commence his role. He was one of three managers.

[21] There is no dispute as to whether his activities were adequately performed.

⁹ Relying on dicta in the Court of Appeal as to the meaning of the term: *R v J* [2018] NZCA 343 at [40] and [48].

[22] On 1 July 2019, Mr Savage received a letter from WSL terminating his employment on the grounds of redundancy, with termination to take effect on 8 July 2019. A few days later, he raised a personal grievance for unjustified dismissal, breach of contract and breach of good faith. Amongst other remedies, he sought interim and permanent reinstatement to his role.

[23] The Authority investigated that issue on 29 August 2019, issuing a determination on 2 September 2019 ordering his reinstatement on an interim basis from the next working day.¹⁰

[24] In its determination, the Authority referred to the circumstances giving rise to the redundancy. It recorded that Mr Shing's brother had become ill in late 2017 and was unable to work for a period of time, so that Mr Shing took responsibility for managing his brother's part of the business operation in addition to his own responsibilities. It was in this context that a decision was made to create the position of Farm Operations Manager.¹¹ The Authority also recorded Mr Shing's evidence that, more recently he had realised he missed his previous role, and he now wished to resume it.

[25] The Authority found that Mr Savage had explained to WSL at the time of redundancy that, in accepting appointment he had made a significant commitment, and that it was his intention to "make a big impact on [the] business for the rest of my working life".

[26] For interim purposes, the Authority said that the factors raised by Mr Shing were not genuine business reasons for justifying redundancy. It recorded there was no evidence that a business or a financial case for the disestablishment of the role was placed before Mr Savage for his consideration. The Authority also found that the role carried out by Mr Savage still existed in its entirety and that its duties subsisted which undermined the basis for the redundancy of the role of Farm Operations Manager.¹²

¹⁰ *Savage v Wai Shing Ltd*, above n 1, at [68].

¹¹ At [10].

¹² At [39]-[40].

[27] The Authority went on to say that there was also a procedural concern that feedback which had been provided by Mr Savage to WSL had not been given full consideration prior to the company's decision to proceed with disestablishment. All the circumstances were relevant, including the fact that Mr Savage had relocated from the United Kingdom to New Zealand, and that the decision to disestablish the role to which he had been recruited was made within six months of relocation.¹³

[28] The Authority found Mr Savage had been explicit in stating that his interest in accepting the position was on the basis of a long-term commitment. It was reasonable for him to have done so, because he was offered a permanent position rather than a fixed-term or other limited duration contract and included a relocation clause, including the total refund of relocation costs if Mr Savage voluntarily left WSL's employment within two years after commencement.

[29] After also considering balance of convenience and overall justice factors, the Authority ordered the interim reinstatement of Mr Savage as Farm Operations Manager of WSL with effect from the next working day after the date of the determination, that is, 3 September 2019. It also ordered that the parties' agreement regarding the subsidised nature of the house provided by WSL and the associated rent payments were to be resumed at the same time.¹⁴

[30] The company did not challenge this determination.

Compliance order

[31] I next record the events leading up to the making of the compliance order, since these provide relevant background to the alleged breaches the Court is required to consider. On the day following the making of the interim reinstatement order, Mr Savage says he arrived for work but was turned away by Mr Shing. Mr Shing said he would not have Mr Savage back, and that Mr Savage would be placed on garden leave.

¹³ *Savage v Wai Shing Ltd*, above n 1, at [42].

¹⁴ At [68]-[69].

[32] For its part, WSL says that Mr Shing made it clear the company needed to obtain legal advice; he agrees he said Mr Savage should take garden leave for the day. Since this was not objected to, and because Mr Savage left the premises, Mr Shing concluded there was agreement on this point.

[33] WSL recommenced paying Mr Savage his salary of \$162,500 per annum. On the same day, he was given the company vehicle which he had used prior to termination, and a company phone. Mr Savage and his wife continued to live in the house provided by WSL.

[34] On 4 September 2019, Mr Savage again arrived for work, but Mr Shing said it was too wet to work. He also said he had assumed all Mr Savage's other duties and would carry on doing so. Given the weather conditions, he would see him the next morning, although he would of course be paid for the day.

[35] Mr Savage's wife had attended and recorded the conversation. This was not disclosed at the time and led to an assertion that a covert recording had been made. Mr Savage said that he was quite taken aback by Mr Shing's statement that the weather was too wet for him to work and did not in those circumstances inform Mr Shing his intention to record the conversation.

[36] Legal correspondence ensued, in which it was confirmed that Mr Savage was expected to be at work the following day and would be advised of his tasks for the day. It was also stated that each following morning, he would be advised by phone of the work to be completed for the day, and that there would be no requirement for him to come into the office unless specifically asked to do so.

[37] On 5 September 2019, Mr Savage attended WSL's office at the usual time, again accompanied by his wife for support. Mr Shing handed him a document outlining tasks he was to perform. It was headed "Farm operations jobs to be started on 5 September 2019". The document described farm maintenance to be undertaken at certain WSL locations. It stated that the object of the task he was being given was to maintain and preserve native plants, which was important "to help preserve the New Zealand environment and our farms". This would include cutting and clearing

unwanted plants down to ground level, then applying a weed killer. The second aspect of the job was to use a knapsack sprayer to spray smaller unwanted plant species. Mr Savage was directed to wear protective clothing. It was stated that there was no requirement for him to attend the company's office or come onto company property outside of normal working hours.

[38] There is a dispute between the parties as to how long he would be required to perform this work. I interpolate that the heading of the document suggested the task would be commenced on 5 September 2019; no end point or indication of longevity of the job was indicated.

[39] Mr Savage says that he continued to perform this work every subsequent working day until he sought the compliance order. He said that the task amounted to no more than one of the 23 key responsibilities listed in a schedule to his employment agreement as a Farm Operations Manager; being assigned one repetitive task was inconsistent with his contracted role. For its part, WSL says that the defined task related to seven of the tasks contained in the job description.

[40] Mr Savage says that the work was dangerous, demeaning and menial, and that there were health and safety risks since no appropriate assessment was ever completed he was not issued with sufficient protective equipment and there was a risk of repetitive back injury. These assertions are denied.

[41] Mr Savage said he would work for nearly 12 hours per day. Mr Shing says this assertion is not verified by GPS records held by the company.

[42] The Authority was satisfied from the affidavit evidence that WSL had not complied with the terms of the interim reinstatement order.¹⁵

[43] As already mentioned, a compliance order was made in which WSL was directed to comply with the Authority's order by reinstating Mr Savage to his position as Farm Operations Manager with effect from the date of the determination.¹⁶

¹⁵ *Savage v Wai Shing Ltd*, above n 2, at [16].

¹⁶ At [17].

[44] Under a heading of “Effect of further non-compliance”, the Authority went on to state that if WSL did not observe or comply with the compliance order, Mr Savage could apply to the Employment Court under s 140 of the Employment Relations Act 2000 (the Act). The Authority referred to particular sanctions contained in s 140(6), including the ability to order that a person in default be sentenced to imprisonment for a term not exceeding three months, to impose a fine not exceeding \$40,000 and to order sequestration of the property of a person in default.¹⁷

[45] Shortly before the Authority was requested to make the compliance order, WSL began an investigation into a complaint that Mr Savage had made derogatory and racist statements to a co-worker about Mr Shing. That led to an issue as to whether WSL could dismiss Mr Savage if the complaint was upheld, given the terms of the interim order. The Authority declined an application for an interim injunction preventing WSL from dismissing Mr Savage as a result of the disciplinary proceeding, as confirmed in a minute on 30 September 2019.¹⁸ In a judgment of 10 October 2019, I allowed a challenge against the determination, and ordered that, until further order of the Court, WSL was not to terminate Mr Savage’s employment, unless the Authority or Court rescinded or varied the interim reinstatement order of 2 September 2019 and the compliance order of 20 September 2019.¹⁹

Alleged breach of compliance order

[46] I turn now from the background events to those which are said to prove that WSL and Mr Shing breached the Authority’s compliance order.

[47] On the day on which the compliance order was made, Mr Savage sent Mr Shing a text message at 11.46 am, asking him if he was available at some point in the near future to discuss the resumption of his role. Mr Shing responded soon after 4.00 pm that day, stating that, due to other commitments, he was unable to meet, but proposed doing so at 6.30 am the next morning, confirming that this would be in the company’s office.

¹⁷ At [18].

¹⁸ Authority minute of 30 September 2019.

¹⁹ *Savage v Wei Shing Ltd* [2019] NZEmpC 141 at [57].

[48] On Saturday, 21 September 2019, Mr Savage attended the office with his wife and met with Mr Shing and his brother. Mr Savage said that a list of key responsibilities was presented to him, and he was asked which ones he thought he was not performing. Mr Savage responded that, on any one day, he would perform a variety of responsibilities and to date he had been performing only one of them.

[49] He was then instructed to crop walk a block known as Charles Road and to send an email report about what he observed to Mr Shing on his phone. He said he had never previously provided reports in this way. Rather, he would jot a few points down in his diary and discuss these, along with the agronomy reports from external consultants, at a weekly agronomy meeting with Mr Shing and another manager held every Thursday. At that meeting, comments of the agronomists would be compared with those of Mr Savage, and a recommendation for the following week's work would then be made. He said he was no longer permitted to attend these meetings. Further, he was no longer receiving relevant text messages from his colleague, with Mr Shing making it clear he was not to contact staff.

[50] He also said that he was directed not to go anywhere else on the farm, and to contact Mr Shing when he finished his duties for the day. He said he noticed various operations were underway in the block that he was working on, but he was not required to oversee these despite such oversight being a normal part of his role. He cited, by way of example, a sprayer operator attending a nearby area to collect his machine, only 15 minutes after he had arrived there himself. Mr Savage said he would always work with the operator when he was travelling to the same place, but instead of doing so he was expected to stick to the task he had been given.

[51] In his evidence, Mr Shing said that processes had changed since 1 July 2019, when the employment of Mr Savage was terminated. He said daily meetings were now not always held, as he could not always attend them. Other managers would receive daily instructions by phone. Further, each manager would forward to him daily crop monitoring notes, videos, and photos. He denied that there were meetings of the kind described by Mr Savage on a Thursday; he said that only himself and one other manager would record spraying schedules, using outside consultants' reports. He said he had never told Mr Savage not to go elsewhere on the farm

[52] The next day, 22 September 2019, was a Sunday on which Mr Savage was not required to work.

[53] On Monday 23 September 2019, Mr Savage was instructed to operate a tractor and cultivator. He said he was told he would be consistently performing this role, weather permitting, until it was completed, and that it was estimated to take one to two weeks. Mr Savage said that prior to his dismissal he would not have been given such a task to perform for an entire day; rather, if the work required doing and others were not available, he might step in for an hour or two until staff could be arranged to do this work. He said that mostly he would oversee such an operation

[54] Mr Shing said he had not told Mr Savage he would be “consistently performing” this job. Mr Shing also said that, on one occasion, Mr Savage had undertaken power harrowing prior to reinstatement at a particular location for a full day. Mr Savage said in further evidence that this had been an unusual and one-off situation, as a normal driver had not been available.

[55] At 6.30 am on 24 September 2019, Mr Savage received a call in which Mr Shing told him that due to wet weather, he would not be able to perform the work he had been given the day before. Despite objections, he was instructed to return to the work of performing cutting down high weeds with an axe, and spraying. He said that as this work was nearing completion, he was also told to mark out another area of territory for the same task. Mr Savage said that since this work had led to the making of the compliance order, he was upset that he was being returned to such a task.

[56] On the morning of 25 September 2019, Mr Savage was required to undertake crop walking on another area of the property and send a report by phone. In the afternoon, he recommenced the axing and spraying of tall weeds.

[57] On 26, 27 and 28 September 2019, Mr Savage says he was required to walk around crops, emailing reports as to their status. Mr Shing said that crop monitoring necessarily involved moving about a range of properties, as Mr Savage had been instructed to do.

[58] On the last of those occasions, Mr Savage said he badly hurt his left calf muscle, for which he had received medical attention, and which had rendered him temporarily absent from his role.

Issue 1: what did the terms of the compliance order require?

[59] In order to assess both the meaning and purpose of the compliance order, it is necessary to start with the interim reinstatement order on which it is based. I have recorded the Authority's conclusions when making the interim order, that the role formerly carried out by Mr Savage still existed in its entirety, and that the continued existence of those duties undermined the basis for concluding that the position was redundant.

[60] The Authority's order was specific: Mr Savage was to be reinstated on an interim basis as Farm Operations Manager of WSL. This was not a case where any conditions were imposed as to the work which would be performed; or that he could be placed in an alternate role, or that he could be placed on garden leave.

[61] The compliance order was to identical effect. Again, no conditions were imposed. The Authority plainly expected Mr Savage to resume his former role without limitation.

[62] Finally, the compliance order expressly referred to WSL. Ms Stewart, counsel for Mr Savage, submitted that it could be inferred the compliance order was also directed to Mr Shing, as a Director of WSL. She argued that such an inference was confirmed because in referring to the consequences of not obeying the compliance order, one of the outcomes expressly referred to was imprisonment; she said that meant the order had plainly been directed at the individual involved, Mr Shing. It was on this basis that she submitted there was a proper basis for considering a sanction against Mr Shing personally.

[63] The authorities are clear that, before imprisonment can be considered for disobedience an Authority or Court order, the order has to be made against the party involved personally.²⁰

[64] Mr Shing was not joined as a party for the purposes of the making of the compliance order. Moreover, whilst WSL was named in the compliance order, Mr Shing was not. I find the Authority's reference to the possible sanction of imprisonment was erroneous, since it plainly could not apply to the entity which was the subject of the compliance order, WSL.

[65] In short, I am not satisfied beyond reasonable doubt that the order was directed to Mr Shing personally so that it would be open to the Court to consider imposing a term of imprisonment on him.

Issue 2: has the compliance order been breached?

[66] The interim reinstatement order has been partially satisfied. From the date it was made Mr Savage has received his salary; he has continued to reside in the subsidised accommodation provided by WSL; and he has been provided with a farm vehicle and cell phone. There is a minor dispute as to whether he should have been provided with a laptop as well. It follows that the compliance order has also been partially satisfied.

[67] The main issue relates to the provision of work. Some work has been provided. WSL submits that Mr Savage has accordingly been reinstated as Farm Operations Manager, performing the majority of the tasks set out in his job description. Mr Savage says this is far from the case, that he is performing three only of the tasks described on that document, but only as a labourer, and that he is not managing any staff or overseeing farm operations as had been the case prior to his termination.

[68] Clause 5 of Mr Savage's individual employment agreement (IEA) is as follows:

²⁰ *Bamber v Air New Zealand Ltd*, above n 8 at 2-3; *ALA v ITE*, above n 8, at [37].

- 5.1 The employee will carry out the duties listed in schedule A and any other duties that are reasonably necessary to carry out this position.
- 5.2 It is expected that all duties will be performed in accordance with the instructions given by the employer and the employee will devote all his working hours and best endeavours to performing the duties in a manner that will promote the employer's interests.
- 5.3 Overall Objective:
 1. To produce and deliver WSL daily requirement of fresh quality produce for local and export markets
 2. To operate the business under Global Gap and WSL protocols at all times
 3. To manage the business in a professional manner balancing profitability and sustainability
 4. To achieve and bettering crop yields
 5. To fully support new and innovative ideas and trials that WSL directors believe will grow the business

[69] Attached to this judgment is the schedule to which cl 5.1 refers, describing the 23 key responsibilities of Mr Savage's role.

[70] With reference to that document, Mr Savage says that until 20 September 2019, he performed "spraying only if required", (para 18); from 21 September 2019, "crop monitoring and agronomist work on all crops", (para 15); and from 23 September 2019, "driving vehicles if required, for example, truck and trailer, tractor, harvester, forklift etc", (para 17).

[71] By contrast, WSL says that up to 20 September 2019, Mr Savage was required to undertake seven items on the schedule all of which related to the cutting of weeds, and spraying, (paras 7, 9, 11, 12, 13, 16, 17, 18 and 23), nine items as a result of being instructed to undertake crop monitoring, (paras 1 to 6, 10, 15 and 22), and two items with regard to the driving of a tractor and harvester, (paras 16 and 17).

[72] Before evaluating these competing contentions, it is necessary to mention that the parties also disagree on the extent to which Mr Savage was, in fact, required to work each and every one of the 23 key responsibilities prior to the termination. Mr Shing produced a schedule which suggested that with regard to some items,

Mr Savage lacked experience and required training, (for example, para 2), and in some respects was not required to perform the role at all, (for example, paras 6, 7, 12, 18, and 20 to 23).

[73] The descriptors in the job description have to be assessed in the context of the IEA. Mr Savage was employed as a “Farm Operations Manager” of a large farm operation employing a number of workers. He was paid a significant salary and provided with a vehicle. The objectives, as described in the employment agreement itself, confirm a management role.

[74] Although the evidence suggested there was some divergence from – and elaboration of – the descriptors in the job description, there is agreement that Mr Savage performed management tasks prior to his dismissal. I need cite only a few examples on which there is a consensus in the evidence: maintaining systems to monitor and control land cultivation; recording and importing data into a relevant computer programme; maintaining responsibility for land cultivation machinery; overseeing certain plant trials; managing land cultivation staff; undertaking some crop monitoring; and operating vehicles only if required which was not often.

[75] From the evidence, it is also plain that up to the date of termination, Mr Savage engaged in overseeing the farm operations in consultation with two other managers, under the overall direction of the directors; and that these persons met regularly in the WSL office to consult over their respective responsibilities.

[76] The details in the job description cannot therefore be construed as if they related to manual tasks that carried no management responsibilities.

[77] I am not satisfied that Mr Shing’s evidence that Mr Savage was performing no fewer than 18 of the defined tasks is reliable. It is an exaggeration to say that the cutting and spraying of plants amounted to effective compliance with seven paragraphs of the job description; that crop monitoring amounted to effective compliance with nine items of the job description and that driving a tractor and cultivator amounted to effective compliance with two items of the job description.

[78] A further problem with the reliability of Mr Shing's evidence is that, in a schedule he provided to the Court summarising the position prior to termination, he recorded that there were eight items in the job description which were "not applicable" – that is, Mr Savage did not actually undertake these tasks prior to termination. However, Mr Shing also said that in the period following reinstatement, Mr Savage was performing eight of them, (paras 6, 7, 12, 18, 20 and 21), and that this indicated he had been properly reinstated. This inconsistency was not explained by Mr Shing.

[79] A yet further difficulty is that Mr Shing's analysis included a full description of events which he himself had assumed since the disestablishment of Mr Savage's position on 8 July 2019. That description confirmed he had taken over the overall management responsibility of many aspects of the farm operation. From Mr Shing's own evidence it must be concluded that responsibilities which were formerly undertaken by Mr Savage have not been performed by him since reinstatement; and in particular, have not been performed since the compliance order was made.

[80] This conclusion is reinforced by several factors. The first relates to the fact that Mr Shing was reluctant to accept Mr Savage back into the workplace. This is evident from the fact that, initially, one task only was assigned to Mr Savage to be worked over sequential days – that of weeding and spraying on a scale that had not previously been required.

[81] Once the compliance order was made, the further task of crop monitoring was added. This was a role that had more responsibility than that of weeding and spraying. Mr Shing said in his reply evidence that prior to his dismissal, Mr Savage devoted 75 to 80 per cent of his time to this role. This assessment is not accepted by Mr Savage. There is no evidence of time records having been maintained, and Mr Shing's evidence appears to have been influenced by GPS records indicating only locations at which Mr Savage's vehicle was positioned from time to time. None of Mr Shing's previous statements in evidence suggested a significant focus on one task, to the exclusion of multiple managerial tasks. Rather, he initially agreed with a statement made by Mr Savage in his evidence to the effect that he walked all growing crops every week. I find that this was a regular task, but not one which was so extensive as to exclude

the exercise of management functions. It is clear that prior to termination, the walking of crops regularly was an aspect of his management role.

[82] Finally, I accept Mr Savage's evidence that the driving of a tractor and cultivator for anything more than a few hours was unusual, and to do so to the extent required (one or two weeks), again in isolation, did not amount to the exercise of a managerial function.

[83] The reluctance to accept Mr Savage back is also demonstrated by the fact that he was specifically instructed not to attend the WSL office; and communication with other staff was restricted. The suggestion made by Mr Shing that he no longer required his managers to attend a daily meeting at 6.30 am to plan the day ahead, since he was able to issue necessary instructions by cell phone or text, is unpersuasive as a point of defence. Not only does it again point to a reluctance to have Mr Savage resume his former role, but such a development confirms Mr Shing has assumed elements of Mr Savage's managerial responsibilities and was reluctant to relinquish them.

[84] There were three further issues on which the parties presented contrary views which they said are relevant to the assessment of tasks assigned to Mr Savage.

[85] The first related to the fact that WSL's business is seasonal in nature. Mr Shing said that the months from mid-May to early November were quieter, with staff working fewer hours; he said that was a time when maintenance activities would be undertaken. Mr Savage stated, however, that although most of the harvest had been completed, it would nonetheless be a busy time if he were to perform his Farm Operations Manager role. He referred to some crops requiring input throughout the year unless interrupted by weather events, naming brassica crops²¹ as an example; the onion and carrot crops would require extensive site agronomy visits with harvesting commencing in October, and that land preparation for pumpkin, squash and watermelon, of which WSL is a significant grower, had commenced in September or earlier. He said that, in the same period, 50 per cent of potato crops would be planted, fertilised and monitored weekly. Mr Shing did not contest these detailed statements in response, repeating only that the company's work is seasonal.

²¹ That is, cauliflower, green and red cabbage, broccoli, and kale.

[86] This issue is assisted by a consideration of Mr Savage's key responsibilities, particularly the requirement that he commit to supplying "quality crops year-round irrespective of weather or other external influences". Further, as already discussed, the emphasis of Mr Savage's IEA is on management responsibilities, rather than the seasonal activities which might be expected of a worker not carrying out management responsibilities such as a labourer. There is no indication either in the IEA itself, or the job description, that Mr Savage's hours and/or activities would be significantly reduced at any particular time of year.

[87] The second issue related to Mr Savage's contention that he had been required to undertake repetitive manual labour for close to 12 hours per day. GPS records were produced which confirmed Mr Savage's vehicle use. On the basis of this data, he generally commenced work at 6.30 am and finished at approximately 6.00 pm, although there were a number of occasions where, for particular reasons, he stopped work earlier. These exceptions were not, initially, spelt out by Mr Savage in his evidence, so that Mr Shing's response to this evidence was understandable. But the real issue, for present purposes, is that although a manager, Mr Savage was required to undertake particular labour-oriented tasks for extended periods and not fulfil his previous management responsibilities.

[88] The third issue related to health and safety concerns which Mr Savage said he had. These were first outlined in some detail in the evidence he tendered to the Authority in support of his application for a compliance order. He said that the initial written instructions given to him on 5 September 2019 stated he was to wear protective clothing at all times but gave no other explicit instructions. The staff protective clothing record confirms that some items were issued that day, as well as a cabbage knife for cutting weeds. Further protective items were issued on 9 September 2019 when weeding was still being performed. A range of spray-related items were issued on 12 September 2019, the day when spraying commenced.

[89] Mr Savage said he specifically raised several health and safety issues which occurred to him. He referred to an instruction to use diesel, which he said was a pollutant and carcinogenic to humans; Mr Shing accordingly changed the instruction and he was required to use water instead. Mr Savage also said he received training in

the use of spray gear only because he raised the need for it. He said he was cognisant of health and safety requirements and that he would not be able to perform spraying unless he had the requisite competency certificate.

[90] Mr Savage explained that the weeds were five to seven metres tall and cutting these with the knife which had been issued was physically impossible, so that he was then provided with an axe. Subsequently, he was provided with a Get Home Safe application on his phone for lone workers, toileting facilities, and given Grower Safe training so that he could use the sprayer. Additionally, another employee was assigned to assist him in the work.

[91] Mr Shing produced health and safety documentation, which consisted of material that would be expected from an operation of this kind where staff are required to carry out a wide range of farming functions. A certificate confirming Mr Savage had received training in mixing, handling and applying agrichemicals was produced. Mr Savage's IEA referred to the fact he would be provided initially with information on health and safety procedures and workplace hazards; it is apparent this orientation was undertaken. Generally, the documentation suggests an awareness of health and safety obligations on the part of the employer.

[92] Mr Savage said that he considered aspects of the weeding and spraying operation to be "dangerous". No doubt, the use of a knife or an axe could potentially be dangerous, but WSL was entitled to expect a senior employee such as Mr Savage to utilise common-sense so as to mitigate any potential hazards, in accordance with the obligation which all workers have to take reasonable care for their own health and safety, one of which was confirmed in his IEA.

[93] In short, I am not satisfied the alleged disobedience of the compliance order was catalysed by a wholly inappropriate approach to health and safety requirements, as was asserted. The real problem was the fact that Mr Savage was required to undertake manual tasks of a kind and on a scale which he had not previously been required to undertake as a manager.

[94] Mr Savage referred to the fact that, after several days of crop walking, he badly hurt his left calf muscle, which required him to receive medical attention, following which he was placed on medical leave. He said that his medical practitioner had indicated it was “entirely possible” that the work-related injury he suffered was linked to the exhaustion and fatigue of the work he was performing. No verification of this was provided by his medical advisor. In any event, the statement of opinion as reported is not definitive, and I make no finding as to the cause of the injury. All that can be said about it for present purposes is that it occurred at work.

[95] That all said, I am satisfied beyond reasonable doubt from the extensive evidence which the parties have placed before the Court that Mr Savage was assigned labour-oriented tasks for extended periods rather management tasks, and that this amounted to a failure to comply with the compliance order for the purposes of s 140(6).

Should sanctions be imposed?

[96] Mr Savage was partially, but not fully, reinstated because there was a significant limitation on the work tasks he was instructed to perform. This occurred because Mr Shing, as a director of WSL, wished to perform the managerial functions of the Farm Operations Manager’s role, Mr Savage was not assigned these.

[97] So far as WSL itself is concerned, a fine of \$40,000 was sought. The question for resolution is given the partial breach of the compliance order, should a fine be imposed at all; and if so, for how much?

[98] An analysis of s 140 of the Act with regard to the imposition of fines was given in *Reynolds*.²² In that instance, a fine had been imposed by the Employment Court, because the employer had failed to obey a compliance order requiring it to pay certain sums of money to the employee.

[99] Making general observations as to the purpose of the sanctions regime in s 140(6), the Court of Appeal stated that, as a starting point, imprisonment and

²² *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)*, above n 3.

sequestration should be regarded as sanctions of last resort for failing to comply with a compliance order.²³

[100] The court went on to observe that although the imposition of a fine does not involve deprivation of liberty, the Act makes it clear a failure to comply with a compliance order is to be taken seriously. Such a conclusion was reinforced by the increase in the maximum sum available for a fine from \$10,000 under the Employment Contracts Act 1991²⁴ to \$40,000 under the current Act.

[101] It was also stated that the power had to be exercised in context. That context was an enforcement response for non-compliance in a manner akin to contempt.

[102] Coming on to describe considerations which would be relevant to the amount of a fine, the Court of Appeal stated that the primary purpose of the subsection was to secure compliance. That was apparent from the wording of the section. Secondly, however, the subsection was intended to enable the court to impose some form of sanction for non-compliance.²⁵

[103] Consequently, a range of factors would be relevant including the nature of the default, steps taken to remedy the breach, track record, deterrence, and financial circumstances. I now address these topics.

Nature of the default

[104] It is important to acknowledge the period of the alleged breaches. Mr Savage says the period ran from 20 September 2019, the date when the compliance order was made, until 28 September 2019, the date when he suffered an injury at work.

[105] I exclude 20 September, the date in which the compliance order was made. Mr Savage sent a text relating to the order in the late morning; although Mr Shing might have responded more promptly to the request from Mr Savage to meet and discuss the situation, I do not consider it appropriate to sanction WSL for non-

²³ At [56].

²⁴ Employment Contracts Act 1991, s 56(7)(d).

²⁵ *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)*, above n 3, at [75].

compliance in respect of the afternoon of 20 September 2019, since the compliance order had only just been made. I also exclude Sunday, 22 September 2019, since it was not a working day. That leaves seven working days of partial compliance for consideration.

[106] Prior to the making of the compliance order, WSL had required Mr Savage to work one task only, that of cutting weeds and spraying for days on end. In the period under review, two additional tasks were introduced, that of crop walking, and that of operating a tractor/cultivator. I conclude that WSL made modest attempts to broaden the range of tasks being assigned. The key point, as already discussed, is that Mr Savage was not permitted to perform his management role.

[107] I am satisfied that the allocation of particular tasks only was deliberate. I have already discussed the fact that Mr Shing was reluctant to see Mr Savage return to the workplace, essentially because he wished to perform the managerial functions formerly undertaken by Mr Savage.

Deterrence

[108] I am satisfied that, having regard to the history, and the fact that the breach was deliberate, specific deterrence must be considered.

Financial circumstances

[109] No evidence has been placed before the Court to indicate that the company would be unable to meet a fine.

Clean hands/good faith issue

[110] Mr Hammond submitted that Mr Savage did not have clean hands, and/or his behaviour did not demonstrate good faith on his part, and that these were relevant considerations. He referred to what was described as a covert recording of the conversation on 4 September 2019, which predates the period of alleged disobedience. It is regrettable that this occurred, although it would appear the circumstances were unintentional. It is not a disqualifying factor. Reference was also made to conduct which the employer is investigating, and which is the subject of my earlier judgment.

There is a dispute between the parties on that issue which cannot be resolved on affidavit evidence; accordingly, I place it to one side.

Conclusion as to claim for fine against WSL

[111] Standing back, there are two key considerations. The first is the relatively confined period of breach of the compliance order, seven working days. The second is that there was, in fact, partial compliance.

[112] Turning to quantum, it is not appropriate, as Ms Stewart submitted, to impose a fine of \$40,000, the maximum amount provided for in the Act. A sanction of that order should be reserved for the most serious cases justifying a fine, which the present case is not.

[113] There are few direct precedents. In *Reynolds*, the Court of Appeal undertook a comprehensive analysis of cases where fines had been imposed, but they related to non-compliance of orders to pay sums of money. Consequently, that survey of cases is not of assistance here.

[114] However, reference was made by both counsel to one sanctions case where there had been an outright failure on the part of an employer to permanently reinstate an employee as had been directed: *Nathan v Broadspectrum (New Zealand) Ltd*.²⁶ When dealing with breaches of the Court's compliance orders, the employer was first fined \$10,000, half of which was directed to be paid to the employee.²⁷ On a second application two months later, the employer was fined \$25,000.²⁸ On the third occasion, a little over five months later, a yet further claim for a sanction was made. The court concluded that, whilst technically the employer remained in breach, it would not be appropriate to impose a fine when the company was attempting to comply with the reinstatement order, and to avoid repeating its earlier mistakes.²⁹

[115] The first instance of disobedience in *Nathan* which led to a fine of \$10,000 has some relevance. However, I do not regard the present case as being nearly as serious.

²⁶ *Nathan v Broadspectrum (New Zealand) Ltd* [2016] NZEmpC 135, [2016] ERNZ 760.

²⁷ *Nathan v Broadspectrum (New Zealand) Ltd* [2017] NZEmpC 90 at [79].

²⁸ *Nathan v Broadspectrum (New Zealand) Ltd* [2017] NZEmpC 116 at [60].

²⁹ *Nathan v Broadspectrum (New Zealand) Ltd* [2018] NZEmpC 16 at [43].

Here, as I have explained, there was partial reinstatement from the making of the interim order; that did not occur in *Nathan*. Then there was an attempt after the compliance order was made to enlarge the range of tasks, although it was insufficient; that did not occur in *Nathan*.

[116] In all the circumstances, I consider a fine of \$2,500 is appropriate, so as to reinforce to WSL that the Authority's orders must be obeyed. Half of this sum should be paid to Mr Savage, and the other half to the Crown.

[117] There are numerous cases where repeated disobedience has resulted in increased sanctions being imposed. I make no comment as to whether further non-compliance will in fact occur here but were it to do so and were the matter to come before the Court again, it is likely a significantly more serious sanction would need to be considered.

[118] For completeness, I refer to Mr Shing's position. I have already determined that the Court has no jurisdiction, since he was not named in the compliance order.

[119] Even if I had concluded that there was jurisdiction, I would not have imposed a term of imprisonment. As noted by the Court of Appeal, such an option is one of last resort. A rare example is found in *ALA v ITE*.³⁰ The circumstances in that case were significantly more serious than those which occurred here.

[120] It is regrettable in my view that such a claim was brought on behalf of Mr Savage against Mr Shing, since there was never any realistic prospect that such an order would be made.

Penalties for breach of good faith

[121] Mr Savage also sought \$10,000 for each of four breaches of good faith, which Ms Stewart indicated was demonstrated by the events of 3 September 2019, the events of 4 September 2019, the events of 5 – 20 September 2019, and the events from 21 September 2019 onwards; alternatively, that a global penalty of \$20,000 should be

³⁰ *ALA v ITE* [2017] NZEmpC 130.

imposed. It was alleged that the events which occurred on those occasions constituted breaches of s 4(1)(a) where parties are required to deal with each other in good faith, and s 4A(a), that each such breach was “deliberate, serious and sustained”.

[122] These claims were strongly opposed by WSL. First, a jurisdictional point was raised. Mr Muggeridge, counsel for WSL, said in his oral submissions that s 133(1) confirmed that the Authority had full and exclusive jurisdiction to deal with all actions for recovery of penalties under the Act either for any breach of an employment agreement, or for a breach of any provision of the Act for which a penalty in the Authority is provided in a particular provision. It was his point that the provisions which are relied on here, ss 4 and 4A, were not particular provisions providing for a penalty in the Authority. Section 133(2) and (3) allow for the recovery of penalties in the Court in certain instances; he submitted that those particular provisions could not give rise to the Court considering a recovery of penalty for present purposes, because s 4A was not a provision for which a penalty in the Court was provided.

[123] The second point made for WSL is that, in the circumstances, it could not be concluded either that there were breaches of good faith of such a kind as to meet the high threshold imposed in s 4A(a).

[124] I am not satisfied that any penalties should be imposed, although there have in effect been breaches of good faith. To do so would, on the facts of this case, amount to a double jeopardy. The primary claim made for Mr Savage was one seeking sanctions. That has been dealt with and granted. It is not appropriate to order penalties as well; I decline that application.

[125] Given those conclusions, and given the brief submissions made as to jurisdiction, it is unnecessary to resolve the statutory interpretation issue raised by WSL.

Disposition

[126] WSL is fined the sum of \$2,500 for the established breaches of the compliance order. Half of this sum is to be paid to Mr Savage; the other half is to be paid to the Crown. The payments are to be made within 14 days.

[127] I reserve costs. I request counsel to discuss this topic directly. There has been a mixed outcome. Should the parties be unable to resolve the issue, any application is to be filed and served within 21 days and responded to within a like period.

B A Corkill

Judge

Judgment signed at 3.55 pm on 1 November 2019

Schedule A

KEY RESPONSIBILITIES & JOB DESCRIPTION

- 1 Manage the planning, production and supply of quality crops as specified currently and in the future from farm to market and packhouse
- 2 Commitment to grow any crops specified by WSL to the best of your ability
- 3 Commitment to supply quality crops year-round irrespective of weather or other external influences
- 4 Maintain systems to monitor and control all aspects of the supply program, including land management, forecasting, crop management, harvesting, quality, transport etc
- 5 Keep all diaries/records up-to-date including; crop rotations, weather, crop forecasting, farm mapping, seeding, transplanting, spraying, fertilizer application, irrigation, harvesting, trials, staff records etc
- 6 Constantly strive to be more competitive in the marketplace by reducing costs and increase efficiency
- 7 Actively commit to all aspects of WSL programs by being responsible for social, environmental and financial aspects of the operation
- 8 Maintain an open-minded approach to accepting and implementation of new ideas and suggestions
- 9 Responsible for cleaning and maintaining all machinery, vehicles, tools and buildings ensuring that they are kept in good working order at all times
- 10 Oversee and actively support new in-field products, systems, nutritional and pest management, trials and development
- 11 Work cooperatively with consultants and advisors as required
- 12 Ensure that land lease requirements are upheld such as maintaining headlands, fence lines, drains, access ways etc for each property
- 13 Manage staff recruitment, training, discipline, scheduling and payment of wages etc
- 14 Help with ordering and purchasing (goods and services) associated with the farming operations
- 15 Crop monitoring and agronomist work on all crops
- 16 Operating machinery and farm implements if required
- 17 Driving vehicles if required e.g. truck and trailer, tractor, harvester, forklift etc
- 18 Spraying only if required
- 19 Harvesting of crops from farms to market/packhouse
- 20 Managing and supervising irrigation onto crops etc
- 21 Help with ensuring, organizing transportation and integrity of produce from farm to packhouse
- 22 Weekly reports on all aspects of field production required
- 23 Manage the visual aspects of the operations to ensure it is always up to standard for customer visits and inspections