

**IN THE EMPLOYMENT COURT
WELLINGTON**

**[2018] NZEmpC 16
EMPC 116/2017**

IN THE MATTER OF an application for further orders to impose
 a fine

BETWEEN JASON NATHAN
 Applicant

AND BROADSPECTRUM (NEW ZEALAND)
 LIMITED (FORMERLY TRANSFIELD
 SERVICES LIMITED)
 Respondent

Hearing: Wellington, 9 November 2017

Appearances: T Cleary, counsel for applicant
 A Lloyd and J Hardacre, counsel for respondent

Judgment: 12 March 2018

JUDGMENT OF JUDGE K G SMITH

[1] On 28 September 2017, Jason Aramiha Nathan made his third application for orders seeking a fine against his employer, Broadspectrum (New Zealand) Ltd for alleged breaches of s 140(6)(d) of the Employment Relations Act 2000 (the Act).

[2] This proceeding has a long history. Its origins lie in my judgment of 28 October 2016 ordering Mr Nathan to be reinstated to his former position.¹ Prior to his dismissal he was a linesman engaged by Broadspectrum on a faults crew working on the Wellington trolley bus network owned by Wellington Cable Car Limited.

[3] Mr Nathan was reinstated from 28 October 2016 but Broadspectrum was provided with an opportunity to plan for his return. His resumption of active duties

¹ *Nathan v Broadspectrum (New Zealand) Ltd* [2016] NZEmpC 135, (2016) 10 NZELC 79-070.

was delayed for 14 days to allow that planning to occur, along with any necessary administrative steps which Broadspectrum had to take.² Mr Nathan was also required to fully cooperate in undertaking any training Broadspectrum required of him.

[4] Although Mr Nathan was reinstated in October 2016 he has not been able to resume duties as a linesman on the faults crew at any time from then until now.

[5] Broadspectrum sought leave to appeal the judgment of 28 October 2016 and applied for a stay until that application was concluded. On 5 December 2016 a stay was granted pending the outcome of Broadspectrum's application.³ A condition of the stay was that Mr Nathan remain on Broadspectrum's payroll and was to be paid the financial remedies referred to in the judgment of 28 October 2016.⁴

[6] Broadspectrum's application was dismissed on 23 May 2017.⁵ Mr Nathan did not resume work on the faults crew after the Court of Appeal's judgment was released because Broadspectrum raised two matters impeding his return to work. The first of them was an assertion that the company still had 14 days from the date of the Court of Appeal's judgment to plan for his return. The second was that Mr Nathan should submit himself to a medical examination, sometimes referred to as a medical assessment, before he could be declared physically fit to return to work. That examination was said to be necessary because the company had become aware of a knee injury sustained by Mr Nathan several years ago.

[7] Those matters culminated in Mr Nathan applying for a compliance order pursuant to s 139(4) of the Act. An order was made on 6 June 2017, and Broadspectrum was ordered to comply by returning Mr Nathan to active duties, at Glover Street, no later than Wednesday 7 June 2017 at 8.00 am.⁶

[8] On 8 June 2017, Mr Nathan sought further orders alleging he had not been returned to active duties. Initially he sought another compliance order but that

² At [86](1)(b).

³ *Broadspectrum (New Zealand) Ltd v Nathan* [2016] NZEmpC 162.

⁴ At [50].

⁵ *Broadspectrum (New Zealand) Ltd v Nathan* [2017] NZCA 202.

⁶ *Nathan v Broadspectrum (New Zealand) Ltd* [2017] NZEmpC 72.

application was not continued and a fine was sought instead.⁷ Three conditions were said to have been imposed by Broadspectrum preventing a return to work. They were that:

- (a) he undergo an induction as a new employee;
- (b) there would be a two-week appraisal of his competence; and
- (c) he would be vetted by Wellington Cable.⁸

[9] After the compliance order was made Mr Nathan had been required to complete a series of written tests, which were referred to as skills assessments, to demonstrate his competency. Aside from an induction on 7 June 2017 he spent the whole of his working day thereafter completing skills assessments which he did under protest.⁹ The company acknowledged the tests were about Mr Nathan's competency and were not regarded by it as training in a conventional sense.¹⁰ Those assessments were a barrier to a return to work.

[10] The result of that application was a judgment of 28 July 2017 and a finding that there had been a breach of the compliance order. The company was fined \$10,000; half of which was directed to be paid to Mr Nathan.¹¹

[11] Mr Nathan's second application seeking a fine was dealt with in a judgment of 27 September 2017 where Broadspectrum was fined \$25,000.¹² This application was made after Mr Nathan presented himself to work after receiving the judgment of 28 July 2017. No work was available for him to undertake and he spent that day in the training room reading a book on "Holmes Law".

[12] Broadspectrum, through its counsel, had stated concerns about Mr Nathan's competency and his ability to undertake work safely,¹³ saying it would not return him

⁷ *Nathan v Broadspectrum (New Zealand) Ltd* [2017] NZEmpC 90 at [19].

⁸ At [18].

⁹ At [26].

¹⁰ At [47].

¹¹ At [79].

¹² *Nathan v Broadspectrum (New Zealand) Ltd* [2017] NZEmpC 116.

¹³ At [15].

to his former job unless it was satisfied he was safe.¹⁴ Instead he was invited to undertake scoping work,¹⁵ which the company considered complied with the Court's decisions.¹⁶ Scoping work is associated with decommissioning the lines network.

This application

[13] This judgment deals with the third application by Mr Nathan for what happened after the judgment of 27 September 2017 was released. On receiving that judgment Mr Nathan sent a text to his immediate supervisor, Mr Carl Whittington, requiring a return to work the next day. An exchange of text messages started after 5 pm, probably around 5.20pm. Mr Nathan sought confirmation he would be given "active duties on the faults crew at my normal start time tomorrow morning".

[14] Mr Whittington's reply was that he did not have work for Mr Nathan on the faults crew but preparatory work for decommissioning the lines was available. That answer was unsatisfactory to Mr Nathan who responded by stating that this work was the same as he had been offered before so nothing had changed. Mr Nathan's text said that if he was not going back to his former job, including being an acting team leader, by early the following morning the matter would need to return to Court.

[15] Mr Whittington was not in a position to agree saying it was not "his call", but was something Mr Nathan would need to take up with James Irvine (Mr Whittington's manager).

[16] Mr Nathan immediately applied to the Court for a further fine to be imposed. He invited the Court to impose the maximum fine of \$40,000 permitted by s 140 of the Act.¹⁷ Broadspectrum opposed the application maintaining it had complied and that the circumstances do not warrant a fine. As an alternative it said any fine should be modest.

¹⁴ At [22].

¹⁵ At [16].

¹⁶ At [23].

¹⁷ Later modified to a submission that an appropriate fine should be imposed.

Further steps after 27 September 2017

[17] From September 2017 onwards, there was a noticeable change in Broadspectrum's attitude to the way in which it dealt with Mr Nathan. On 3 October 2017, three business days after the judgment was issued, Broadspectrum's new counsel, Mr Lloyd, wrote to Mr Cleary about this application.

[18] The correspondence began with a suggestion this application was premature because it was made while Mr Nathan was on sick leave. That point aside, Broadspectrum said it was not attempting to refuse to reinstate him and its intention was to comply and avoid further litigation. In this letter Mr Nathan's right to return to work as a line mechanic was acknowledged. A positive statement was made that he would be returned to active duties as a line mechanic and acting team leader. A meeting was proposed for 5 October 2017 to formulate and agree on Mr Nathan's duties. The idea was to agree about what work Mr Nathan could do immediately and any steps needed to enable him to return to the balance of his duties as quickly as possible.

[19] There was a prompt reply on 4 October 2017, stating Mr Nathan's competency and safety to return to work and agreeing to further training so long as that was not a barrier to resuming work. The point being made was that compliance was required and the Court's orders did not contemplate reaching further agreement.

[20] Broadspectrum's counsel replied the same day about the company's plan for a return to active duties effective immediately. Mr Nathan was informed he was to be part of a faults crew referred to as "Green Team", which crew was undertaking a range of refresher training courses that Friday, and the following Monday and Tuesday (6-10 October 2017). The subjects of the training were for Hi-Ab Truck Mounted Crane Operations, use of an elevated work platform and a Unit Standard regarding Energised and Non-Energised Networks respectively. Broadspectrum considered it would be beneficial for Mr Nathan to attend that training, before

joining Green Team on active duty from Wednesday 11 October 2017. That date coincided with Mr Nathan's anticipated return from sick leave.

[21] In the course of this correspondence Mr Nathan was told he was to be supervised by a named senior lines mechanic who would assist and train him while carrying out day-to-day duties. The need for a supervisor was explained because of Mr Nathan's absence over the previous four years during which there had been changes to the company's practices and its technology. Broadspectrum's proposal, therefore, was that he join the Green Team while it undertook refresher training and from 11 October 2017 begin normal faults-related work under supervision.

[22] There was one qualification to this proposal because Mr Nathan was not to be allowed to immediately carry out switching and isolation work. That work required specific training and "sign-off" by Wellington Cable. The length of time since Mr Nathan had previously been authorised to do that work was used to explain why he could not be allowed to undertake it when he returned without first completing further training which was to be given "on the job".

[23] Mr Nathan was sceptical about the invitation to attend training sessions. He considered he did not need to be referred for further training about the Hi-Ab or elevated work platforms because he had already completed a Unit Standard in working on an Elevated Work Platform and his certification in its use was current.

[24] Those reservations led to further negotiations about Mr Nathan's return to work. On 5 October 2017, Broadspectrum stated that, if Mr Nathan did not wish to take up the training proposed for Friday 6 October, he would not be able to start duties that day because his nominated supervisor would have been working on the night of 5 October 2017 and would not be at work the next day. Furthermore, as the majority of the employees at the Glover Street site were scheduled to attend Hi-Ab training only a skeleton staff remained on duty. A problem with resuming work on the following Monday and Tuesday (that is 9 and 10 October) was also signalled because of the other training taking place on those days, to which Mr Nathan had been invited.

[25] Faced with continuing resistance, Broadspectrum made changes which it communicated on 6 October 2017. The nominated supervisor was able to be removed from the training he was scheduled to undertake so he could begin supervision on Monday 9 October. Consequently, Mr Nathan was asked to present himself to begin work at 7.30 am on that day to meet the supervisor and Mr Whittington. Confirmation that Mr Nathan would present himself to work was sought.

[26] Broadspectrum also informed Mr Nathan that it did not require Wellington Cable's consent for his return to work, because it had given that company a written assurance of his competency. A copy of Broadspectrum's letter to Wellington Cable dated 6 October 2017, was provided.

[27] Broadspectrum's letter to Wellington Cable said Mr Nathan was expected to start work on Wednesday 11 October 2017 as a lines mechanic under supervision. That company was also told he would not be able to perform any switching or isolation work until he had been trained and "signed off" as competent. With those comments Broadspectrum warranted that Mr Nathan was competent to return to active duties.

[28] Unfortunately, this correspondence and Broadspectrum's proposals did not provide the comfort or assurances Mr Nathan sought because of the reference to his competency. Mr Nathan read that letter as imposing a competency barrier, because he thought Broadspectrum still reserved to itself the right to decide if he was able to perform switching and isolation. What drove his reluctance to accept what had been said to Wellington Cable was a concern that Broadspectrum's process of "signing off" his competency for those activities would be a repeat of his previous experience of the skills assessments.

[29] Mr Nathan conceded the letter to Wellington Cable did not refer to a classroom-type assessment of the sort he had experienced. He also accepted having been told Broadspectrum would provide this training "on the job". Despite that, he still considered a barrier on his return to work was being created.

[30] Mr Nathan did not return to work and remained on stress leave.

Mr Nathan's case

[31] The case for Mr Nathan was that Broadspectrum remained in breach after 27 September 2017 and, consequently, a further fine was justified. Broadspectrum was said to have been in breach since the compliance order on 6 June 2017, and in contempt since the judgment of 28 July 2017.

[32] Mr Cleary was not suggesting events prior to 27 September 2017 should be reflected in the level of the fine because they had already been dealt with. However, he submitted events prior to 27 September 2017 inform the circumstances of Broadspectrum's on-going breach. Viewed in that light, there is nothing material, it was said, in the fact Mr Nathan's application was made almost immediately after the 27 September 2017 judgment was released. It was just part of a continuum in which Broadspectrum carried on the path it had set for itself.

[33] Imposing a fine under s 140 of the Act is deliberately coercive, to enforce compliance. Broadspectrum's contract to provide maintenance work for Wellington Cable expired on 31 October 2017. The termination of the contract makes compliance impossible so that the emphasis has shifted towards punishing the company for what is said to have been a continuing breach.

Has there been a breach?

[34] The legal test is whether it has been established beyond reasonable doubt that a breach has occurred.¹⁸

[35] Mr Nathan did not resume work as a linesman on 28 September 2017 or at any subsequent time. I am satisfied beyond reasonable doubt Broadspectrum remained in breach of the compliance order of 6 June 2017, because it did not return Mr Nathan to active duties.

¹⁸ *Fletcher Development and Construction Ltd v New Zealand Labourers IOUW* [1988] NZILR 954 (LC).

Is a sanction appropriate?

[36] Sanctions are provided for by s 140(6) of the Act which reads:

- (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.

[37] Section 140(6) is discretionary. The Court may do one or more of the things listed in subsections 6(a)-(e) inclusive but is not compelled to do so.

[38] Mr Nathan read Mr Whittington's emails as a refusal to put him back on the faults crew. Just as easily they can be read as stating he had no information and no authority to act, so inquiries would need to be made of someone more senior. Those text messages took place at the end of a business week. Reasonably promptly thereafter, on 3 October 2017, the company stated it would comply and changed what it had been doing.

[39] What followed were attempts to invite Mr Nathan to reach an agreement or understanding to avoid further problems. With the benefit of hindsight some of that correspondence may not have been as clearly written as intended.

[40] Throughout 3 - 6 October 2017, Broadspectrum was signalling to Mr Nathan he was to return to work as a lines mechanic as an active member of the Green Team faults crew. He was being invited to fully participate in all aspects of that team's work including its training. The only impediment to him working as part of that team was a restriction on switching and isolation, for which he was to get "on-the-job" training. Mr Nathan's response was conditioned by Broadspectrum's previous poor-quality treatment of him and he reacted to a reasonable concern about those activities by seeing it as another barrier of the sort he had previously experienced. His scepticism was understandable but unfortunate.

[41] Given the protracted litigation between Mr Nathan and Broadspectrum it was reasonable for an attempt to be made to ensure the return to work went as smoothly as it could do and that misunderstandings were avoided. Unfortunately, as things transpired, a misunderstanding was not avoided.

[42] One observation needs to be made because it will be apparent that the change of strategy by Broadspectrum occurred very close to the end of the contract it had with Wellington Cable. While it might be tempting to link those events, that submission was not made. The company was not questioned about the proximity of those events and there was no suggestion it was attempting to take advantage of them.

Conclusion

[43] Previously, Broadspectrum had maintained it was within its rights to be satisfied about Mr Nathan's competency before he resumed work. That attitude changed demonstrably in early October 2017 with genuine efforts to get him back to work. The resulting stand-off was not caused by Broadspectrum's proposal for a resumption of work but emerged from the way Mr Nathan interpreted Broadspectrum's correspondence. While, technically, Broadspectrum remained in breach I consider it would not be appropriate to impose a fine on the company when it was attempting to comply and, in so doing, to avoid repeating its earlier mistakes.

[44] Mr Nathan's application is dismissed.

[45] Costs are reserved. My preliminary view is that costs should lie where they fall. If either party wishes to apply for them memoranda may be filed.

K G Smith

Judge

Judgment signed at 1.00 pm on Monday 12 March 2018