

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

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

**[2020] NZEmpC 176
EMPC 104/2020**

IN THE MATTER OF an application for a compliance order

BETWEEN CORY GATES
 Plaintiff

AND DC CLADDING AND RE-CLAD
 SOLUTIONS LIMITED
 Defendant

Hearing: 28 October 2020
 (Heard at Auckland)

Appearances: P Mathews, advocate for plaintiff
 No appearance for defendant

Judgment: 2 November 2020

JUDGMENT OF JUDGE KATHRYN BECK

[1] This is a claim by Mr Gates against DC Cladding and Re-Clad Solutions Limited (DC Cladding), seeking orders under s 140(6) of the Employment Relations Act 2000 (the Act) that the Court impose a sanction on the company because it has not complied with a compliance order made on 10 January 2020 by the Employment Relations Authority under s 137 of the Act.¹

¹ *Gates v DC Cladding and Re-Clad Solutions Ltd* [2020] NZERA 9 (Member Larmer) [Compliance order determination].

[2] The compliance order relates to two determinations of the Authority, the first being a substantive determination dated 1 October 2019,² and the second, a costs determination dated 16 October 2019.³

[3] There was an earlier determination by the Authority dated 1 August 2019 which held, among other things, that:⁴

- (a) Mr Gates was an employee of DC Cladding;
- (b) DC Cladding breached s 65 of the Act because it failed to provide Mr Gates with a written employment agreement;
- (c) a penalty should be imposed on DC Cladding for its breach of s 65 of the Act;
- (d) Mr Gates is owed wage arrears;
- (e) DC Cladding breached its duty of good faith to Mr Gates;
- (f) a penalty was to be imposed on DC Cladding for its breach of good faith;
- (g) DC Cladding unjustifiably disadvantaged Mr Gates in his employment;
- (h) DC Cladding constructively dismissed Mr Gates and such dismissal was unjustified; and
- (i) Mr Gates was entitled to remedies for his unjustified dismissal.

² *Gates v DC Cladding and Re-Clad Solutions Ltd* [2019] NZERA 556 (Member Larmer) [Remedies determination].

³ *Gates v DC Cladding and Re-Clad Solutions Ltd* [2019] NZERA 591 (Member Larmer) [Costs determination].

⁴ *Gates v DC Cladding & Re-Clad Solutions Ltd* [2019] NZERA 453 (Member Larmer) [Substantive determination].

[4] The determination of the Authority dated 1 October 2019 set out the remedies awarded to Mr Gates and the penalties ordered against DC Cladding. It made the following orders:⁵

- (a) Within 28 days of the date of this determination, D C Cladding is to pay Mr Gates;
 - (i) \$2,869.60 wage arrears;
 - (ii) \$458.57 holiday pay;
 - (iii) \$18,000 distress compensation;
 - (iv) \$7,661.34 lost remuneration; and
 - (v) \$71.56 to reimburse his filing fee.
 - (b) Within 28 days of the date of this determination, D C Cladding is to pay to the Crown bank account;
 - (i) \$2,000.00 as a penalty for failing to provide a written employment agreement; and
 - (ii) \$3,000.00 as a penalty for breaching its good faith obligations under the Act.
 - (c) The Authority further orders the Crown to pay, from the penalties it recovers, to Mr Gates:
 - (i) \$1,000.00 of the penalty recovered for the breach associated with the failure to provide Mr Gates with a written employment agreement; and
 - (ii) \$1,500.00 of the penalty recovered for DC Cladding's breach of good faith under the Act.
- ...

[5] In the costs determination dated 16 October 2019,⁶ the Authority ordered that, within 30 days of the date of that determination, DC Cladding pay Mr Gates \$4,500 towards his legal costs plus \$71.56 to reimburse his filing fee.

[6] DC Cladding did not pay any of the amounts it was ordered to pay.

⁵ Remedies determination, above n 2, at [56].

⁶ Above n 3.

[7] Mr Gates applied to the Authority seeking a compliance order that DC Cladding pay him the amounts he had been awarded and as set out in the Authority's two determinations dated 1 and 16 October 2019.

[8] By way of a determination dated 10 January 2020,⁷ the Authority ordered DC Cladding, within 14 days of the date of that determination, to comply with the two determinations it had previously issued and, in particular:⁸

- (a) Paragraphs [56](a)–(c) of its 1 October 2019 determination by paying Mr Gates \$34,061.07 and the Crown Bank Account \$2,500; and
- (b) Paragraph [10] of its 16 October 2019 determination by paying Mr Gates \$4,500.

[9] It also awarded Mr Gates costs in relation to the application for that compliance order; \$500 towards his actual costs plus \$71.56 to reimburse his filing fee.

[10] Despite the determinations and the subsequent compliance order, DC Cladding has not made any payments to Mr Gates or to the Crown.

[11] At the hearing on 28 October 2020 I heard evidence from Mr Gates that no payments had been made to him at all and that he had had no contact from DC Cladding or its director, Mr Dean Cook, since the determinations were issued.

[12] The procedural history of this matter in the Authority is relevant to the sanctions which have been requested.⁹ This history illustrates a complete failure by both DC Cladding and Mr Cook as director to engage in the Authority's investigation in a constructive manner. That continues to be the case in relation to the proceedings in this Court.

⁷ Compliance order determination, above n 1.

⁸ At [9].

⁹ Substantive determination, above n 4, at [11]–[30].

[13] The company was served with these proceedings on 31 May 2020. It took no steps.

[14] Mr Cook, the company's director, was served with a summons to appear at this hearing, together with a notice of the hearing on 24 September 2020. Mr Cook failed to attend Court and there was no appearance for the defendant. The notice of hearing sets out the consequences of non-attendance, as does the witness summons. The matter proceeded in their absence.

[15] The summons required that Mr Cook bring with him all bank statements, books of account and financial records for the financial year ending 31 March 2019, relating to DC Cladding. As a result of Mr Cook's non-attendance and the failure to produce financial records, the Court had no material before it as to the financial circumstances of the company.

[16] The power to impose a sanction is in s 140(6) of the Act and reads:

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.

[17] The statement of claim initially sought orders that property be sequestered and a sentence of imprisonment be imposed. However, Mr Mathews advised the Court that those claims were not being pursued and only a fine was now being sought. He submitted that \$10,000 was appropriate.

[18] The first issue is to consider whether a sanction should be imposed at all. Breach of a compliance order is taken very seriously. The primary purpose of s 140(6) is to secure compliance; a further purpose is to impose a sanction for non-

compliance.¹⁰ In this case I consider a fine is the appropriate sanction and that is consistent with the submission made by Mr Mathews, advocate for the plaintiff, at the hearing. In *Peter Reynolds* the Court of Appeal indicated that a range of factors will be relevant in assessing the level of a fine. Those factors include the nature of the default (deliberate or wilful), whether it is repeated, without excuse or explanation, and whether it is ongoing or otherwise.¹¹ Any steps taken to remedy the breach will be relevant, together with the defendant's track record. Proportionality is another factor and will require some consideration of the sums outstanding. Finally, the respective circumstances of the employer and the employee, including their financial circumstances, will be relevant.

The nature of the default – deliberate or wilful?

[19] There was no evidence before me as to why the amounts owed to Mr Gates have not been paid after the determinations and the compliance order were issued. Mr Mathews submitted that the breaches were deliberate and wilful. I agree.

[20] Given the service on the company, it is apparent that it is aware of the compliance order but has taken no steps to comply whatsoever. Mr Mathews submitted that the failure to engage in the Authority and in this proceeding displays contempt towards the Authority and the Court. Again, I agree.

The defendant's track record

[21] There is no evidence of DC Cladding having appeared in the Authority or this Court previously for breaches of this nature. Accordingly, it is appropriate to treat it as a first offender for the purposes of this assessment.

¹⁰ *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)* [2016] NZCA 464, [2017] 2 NZLR 451, [2016] ERNZ 828 at [75].

¹¹ At [76].

Remediation

[22] As already indicated, the defendant has made no attempt to remedy this situation. No payments have been made to Mr Gates or the Crown. The amounts have been outstanding for over 12 months from the date of the determinations.

The circumstances of the employer, including financial circumstances

[23] In the absence of information from DC Cladding, I consider it appropriate to assume that it is in a position to pay a fine.

The circumstances of the employee, including financial circumstances

[24] Mr Gates set out for the Court the significant personal impact that occurred for him and his family when he was deprived of the wages he was owed over the period leading up to his resignation and, in particular, over the Christmas period in 2018. It was apparent that this caused him a considerable amount of personal distress which was exacerbated by the failure to pay the awards made by the Authority. Mr Gates explained how the financial pressures took a large toll on him and his partner and his family. The financial struggle faced by him and his family as a result of the non-payment caused him significant distress.

Deterrence

[25] In the circumstances that I have outlined, I consider that there is a need to impose a sanction on DC Cladding to deter it from further breaches of Authority orders. It is also appropriate to take into account general deterrence to underline that such orders must be obeyed.

The fine

[26] The maximum fine is \$40,000. I have considered the range of fines recently imposed under s 140(6) as set out in the decision of this Court in *Cooper v Phoenix*

*Publishing Ltd.*¹² The cases set out by his Honour Judge Smith illustrate that where an employer in breach has taken no steps to address the breach, and there is no issue about capacity to pay or history of previous breaches, the fines start at approximately \$10,000. Those cases which have resulted in lower fines are few and have involved attempted remediation by the defendant, or at least reasonable efforts to remediate the breach.

[27] As set out above, there has been no attempts by this defendant to remediate the breach in any way at all. I consider that the breaches were deliberate and ongoing, and were a contemptuous disregard of the Authority's orders and, for that matter, the processes of this Court. On that basis, the case is comparable to *Domingo v Suon*,¹³ *Carruthers v Brommel Roofing Ltd*¹⁴ and *Cooper*,¹⁵ and therefore it is appropriate that a fine of \$10,000 be imposed.

[28] Further, such order is proportionate in the circumstances, having regard to the total amount owing under the compliance order.

[29] Section 140 allows me to order that part of the fine be paid to Mr Gates. Taking into account that he has borne the burden of having to make this application, and it has clearly been distressing and inconvenient to him, I consider it would be just to order that of that fine, \$7,500 is to be paid to him to go some way to offset the difficulties he has faced.

Outcome

[30] DC Cladding is ordered to pay a fine of \$10,000, and of that sum \$7,500 is to be paid to Mr Gates, with the remainder of \$2,500 to be paid to the Crown.

¹² *Cooper v Phoenix Publishing Ltd* [2020] NZEmpC 111 at [28]–[33].

¹³ *Domingo v Suon* [2017] NZEmpC 23, [2017] ERNZ 82.

¹⁴ *Carruthers v Brommel Roofing Ltd* [2020] NZEmpC 22.

¹⁵ Above n 7.

Costs

[31] Costs have not been sought in this matter as Mr Mathews is undertaking this work on a pro bono basis.

Kathryn Beck
Judge

Judgment signed at 1 pm on 2 November 2020