

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

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2020] NZEmpC 22
EMPC 448/2019**

IN THE MATTER OF	an application for a fine for breach of compliance order
BETWEEN	PAUL CARRUTHERS Plaintiff
AND	BROMMEL ROOFING LIMITED Defendant

Hearing: 2 March 2020
(Heard at Wellington)

Appearances: A Bell, counsel for plaintiff
No appearance for defendant

Judgment: 2 March 2020

ORAL JUDGMENT OF JUDGE M E PERKINS

[1] These proceedings have been brought before the Court pursuant to s 138(6) of the Employment Relations Act 2000 (the Act) which in turn gives the Court the jurisdiction to deal with a defaulting party under s 140(6) of the same Act.

[2] The case involved a claim for compensation and presumably other remedies arising from the unjustifiable dismissal of the plaintiff, Mr Carruthers, from employment with the defendant company, Brommel Roofing Ltd (Brommel).¹

[3] The parties went to mediation and a mediated settlement was reached which was signed by a mediator, also pursuant to the provisions of the Act. The settlement

¹ *Carruthers v Brommel Roofing Ltd* [2019] NZERA 639.

that was reached was that Mr Carruthers would receive compensation of \$25,000 together with a contribution towards legal fees of \$2,500 plus GST. Normally the terms of a mediated settlement are to be kept confidential except for enforcement purposes and that, of course, arises in the present case. As a matter of logic, the Court needs to reveal the arrangement that was reached between the parties.

[4] Following the mediated settlement, Brommel made payments totalling \$6,000, but no other payments, and the contribution towards legal fees was not paid. Mr Carruthers then sought a compliance order from the Employment Relations Authority (the Authority) pursuant to s 137 of the Act. On 7 November 2019, in a determination of the Authority, Brommel was ordered to make compliance with the mediated settlement and was also given a warning of the consequences which would follow if it did not meet the settlement. I should mention that Brommel showed complete contempt for the Authority's position in the matter and failed to participate in the investigation before Member Loftus who made the determination on 7 November 2019.

[5] So, the matter has been brought before the Court via the sections that I have mentioned. Pursuant to s 140(6)(d) of the Act the plaintiff, Mr Carruthers, now seeks a fine be levied against Brommel for failing to carry out the directions of the Authority in its determination by way of compliance. The maximum fine under that sub-section is \$40,000. Clearly, a fine of that level is reserved for defendants who have carried out a serious breach of a mediated settlement or an Authority or Court order for which compliance has been ordered, or where there is repeat failure to comply. That is not the case here.

[6] I have had written and oral submissions today from Mr Bell, counsel representing Mr Carruthers. Those submissions set out the legal requirements that give rise to the application to the Court today and also set out details of previous Court decisions where fines have been imposed upon parties who are in default with compliance orders.

[7] For first-time appearances, the authorities would tend to suggest that fines in the region of \$10,000 could be imposed. I was referred to the decision of the Court of

Appeal in *Peter Reynolds Mechanical Ltd, (T/A The Italian Job Service Centre) v Labour Inspector*.² That was an appeal to the Court of Appeal against a decision of the Employment Court,³ in which the fine that had been imposed by the Employment Court was reduced substantially.⁴ Mr Bell representing Mr Carruthers today has, however, pointed out, that was a situation where, prior to the hearing, the defendant had paid the amount of the original liability to its former employee. This was regarded as a serious mitigating circumstance by the Court of Appeal, substantially reducing the fine that had been imposed. That does not apply here.

[8] There are aggravating factors. The fact that no one from Brommel participated in the proceedings before the Authority Member when the compliance order was being considered is contemptuous of the Authority and an aggravating feature. Brommel has taken no steps whatsoever in the present application before the Court. Brommel has been served with all the papers, and even though it had taken no steps within time to the application for a fine, I directed the Registrar to ensure that notice of today's hearing was served on the registered office of Brommel, and that was done. In addition, prior to dealing with the matter today I arranged for my Registrar to call Brommel outside the Courtroom and within the precincts of the Court. No appearance has been registered. That is also an aggravating feature and the sign of the contemptuous way that Brommel has treated these matters and its obligation under a mediated settlement.

[9] The fact that a payment under a mediated settlement has not been made is also aggravating because it was a method whereby Brommel was able to stave off potential proceedings in the Authority which Mr Carruthers would be likely to bring against it. Accordingly, Mr Carruthers has been prejudiced by the fact that at mediation and, in good faith, he negotiated a settlement with Brommel which presumably would have compromised the amount that he would have been seeking if a hearing before the Authority had taken place. For an employer to enter into negotiations, settle the matter

² *Peter Reynolds Mechanical Ltd, (T/A The Italian Job Service Centre) v Labour Inspector* [2016] NZCA 464, [2016] ERNZ 828.

³ *Labour Inspector v Peter Reynolds Mechanical Ltd, (T/A) The Italian Job Service Centre* [2015] NZEmpC 41, [2015] ERNZ 635.

⁴ From \$5,500 to \$750.

and then fail to comply with the settlement without giving any good reason for doing so, in my view, is an aggravating feature.

[10] I have no mitigating circumstances before me, because the company has not appeared. I have no information on its financial circumstances and therefore presume that it is in a position to meet whatever fine the Court imposes. There is some indication, properly referred to the Court by counsel for Mr Carruthers, that they are aware of another claim which had been made against Brommel in circumstances where apparently liquidation proceedings were initiated in the High Court. That claim was apparently settled, and the company is certainly not now in liquidation and can only be presumed to be still trading and in reasonable financial circumstances.

[11] Mr Carruthers has suffered hardship from the fact that he has not received payment. He is not a person of great financial means. He supports a family, according to the information that has been provided to the Court. In circumstances therefore, where an employer fails to meet agreed obligations to a former employee, it is not compliance with good faith or reasonable to then fail to meet the obligations undertaken. I have given consideration to the authorities dealing with fines in such circumstances previously issued by the Court. I put aside *Peter Reynolds Mechanical* where unlike the present case there were special circumstances in that the liability to the employee was met in all respects other than the fine. Obviously, that was grounds for substantially reducing any fine which might then be imposed. I consider that an appropriate fine in this case to be levied against Brommel Roofing Ltd is \$10,000.

[12] Mr Bell has also made submissions on the ability of the Court to divide any fine imposed between the plaintiff personally and the Crown. It is a normal circumstance, empowered by s 140(7) of the Act, when a fine is levied, for a reasonably substantial portion of it to be awarded to the former employee as some solatium for the further distress and humiliation gone through because of having to take steps to enforce. This is quite independent of the fact that legal costs have needed to be incurred.

[13] In my view, an appropriate division of the \$10,000 fine which I am imposing in this case is to award \$7,500 to Mr Carruthers with the remaining \$2,500 going to the Crown.

Costs

[14] In addition to the imposition of the fine, Mr Bell has sought a contribution towards costs on behalf of Mr Carruthers in having to take steps of enforcement. Presumably there have been costs awarded in the Authority. I am not sure whether there was a further determination there, but the costs which are sought in respect of these enforcement proceedings is on the basis of Category 1A under the Court's Guideline Scale. That amounts to a sum of \$4,531.50 and, in addition to that, disbursements of \$306.67 have been incurred by way of filing fees. So, in addition to the Court imposing a fine and ordering Brommel Roofing Ltd to pay a fine of \$10,000, Brommel is also ordered to pay costs towards Mr Carruthers' legal expenses of \$4,531.50 together with the disbursement of \$306.67 for the filing fee.

Addendum

[15] Mr Bell informs me that the Authority Member in the determination on 7 November 2019 reserved costs. It appears that no application has ever been made to the Authority to give an award of costs in respect of the enforcement proceedings there. I consider that it is appropriate that there be an award of costs in respect of the Authority proceedings, so this matter is finally concluded.

[16] The Court, on an application such as this, has jurisdiction to revisit that matter.⁵ The normal tariff for costs in the Authority, I understand, is \$4,500 for a day's hearing. In the Authority, Member Loftus dealt with the matter on the papers. I consider that an appropriate award of costs in respect of the Authority proceedings would be \$2,500. Accordingly, in addition to all of the other orders I have made, I order Brommel Roofing Ltd to make a contribution towards Mr Carruthers' legal costs in respect of

⁵ Employment Relations Act 2000, sch 3 cl 19(1).

the Authority part of the proceedings of \$2,500. It is also ordered to pay that sum in addition.

[17] Brommel remains liable to pay the balance of the funds owing under the settlement agreement and Mr Bell informs me that enforcement proceedings are being considered.

M E Perkins
Judge

Judgment delivered orally at 12.10 pm on 2 March 2020