

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

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

**[2022] NZEmpC 135  
EMPC 373/2021**

IN THE MATTER OF      an application under ss 138(6) and 140(6) of  
the Employment Relations Act 2000

BETWEEN                GURJIT SINGH  
Plaintiff

AND                        JARNAIL SINGH DHALIWAL  
First Defendant

AND                        VEER ENTERPRISE LIMITED  
Second Defendant

Hearing:                On the papers

Appearances:        J Wood, advocate for the plaintiff  
No appearance for the defendants

Judgment:            2 August 2022

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**JUDGMENT OF JUDGE B A CORKILL**

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[1] Mr Gurjit Singh seeks sanctions against Mr Jarnail Dhaliwal and Veer Enterprise Limited (VEL).

[2] The Employment Relations Authority ordered VEL to pay lost wages, compensation and wage arrears to Mr Singh.<sup>1</sup> A costs determination was issued on 20 July 2021, finding VEL and Mr Dhaliwal jointly and severally liable to pay costs of \$5,500 to Mr Singh.<sup>2</sup>

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<sup>1</sup> *Singh v Dhaliwal* [2021] NZERA 247 (Member Arthur).

<sup>2</sup> *Singh v Dhaliwal* [2021] NZERA 310 (Member Arthur).

[3] Payments of these sums were to be made within 28 days of the respective determinations, but this did not occur.

[4] Accordingly, in a third determination, issued on 20 September 2021, the Authority made compliance orders as follows, which were to be satisfied within 28 days of the date of the determination.<sup>3</sup>

[5] The orders were:<sup>4</sup>

(a) The second defendant was directed to pay the plaintiff within 28 days of the date of the determination (being 20 September 2021):

(i) \$6,750 awarded as lost wages, with interest sought on that amount from 9 July 2021 to the date of payment; and

(ii) \$10,000 awarded as distress compensation, with interest sought on that amount from 9 July 2021 to the date of payment; and

(iii) \$3,801.25 awarded as wage arrears, with interest sought on that amount from 30 March 2020 to the date of payment.

(b) The first and second defendants were ordered, jointly or severally, to pay the plaintiff:<sup>5</sup>

(i) \$5,500 awarded as costs, with interest sought on that amount from 18 August 2021 to the date of payment; and

(ii) \$1,196.56 awarded as further costs and expenses in relation to an application made for compliance orders and interest.

[6] The first defendant was also found liable under s 142Y of the Employment Relations Act 2000 for the above wage arrears of \$3,801.25 due to Mr Singh. The

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<sup>3</sup> *Singh v Dhaliwal* [2021] NZERA 408.

<sup>4</sup> At [18].

<sup>5</sup> At [19].

Authority directed that if the company was unable to pay those arrears within 28 days of the date of the determination, the first defendant was to pay that sum to Mr Singh within that same period of 28 days.<sup>6</sup>

[7] The effect of these orders was that both defendants were to comply with the orders made for the payment of wage arrears and costs; but only the second defendant was liable for the lost wages and distress compensation.

[8] The Authority noted that should either defendant fail to comply with the orders made, Mr Singh could apply to this Court for exercise of its powers to fine, imprison, or sequester the property of the person in default.<sup>7</sup>

[9] Due to default on the part of both defendants, an application for sanctions has now been made under s 140(6) of the Employment Relations Act 2000 (the Act).

[10] There were difficulties in service, but these were resolved in the Court's interlocutory judgment of 18 May 2022.<sup>8</sup> I am satisfied that service of the proceeding has been effected on both defendants. They have elected to take no steps.

[11] On the basis of evidence filed on behalf of the plaintiff in this proceeding, I am satisfied that the sums which each defendant were directed to pay have not been paid.

[12] Section 140(6) of the Act relevantly states:

**140 Further provisions relating to compliance order by court**

...

(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:

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<sup>6</sup> At [20].

<sup>7</sup> At [21]; Employment Relations Act 2000, ss 138(6) and 140(6).

<sup>8</sup> *Singh v Dhaliwal* [2022] NZEmpC 84.

- (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.

...

[13] When considering a sanction, it is necessary to approach the exercise in a principled way. The first issue is whether a sanction should be imposed at all.

[14] As the Court of Appeal made clear in *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)*, the primary purpose of the sanctions regime is to secure compliance.<sup>9</sup> A further purpose is to impose a sanction for non-compliance.

[15] In *Peter Reynolds*, the Court of Appeal indicated a range of factors which would be relevant when assessing the level of a fine. They include the nature of the default (whether it is deliberate or wilful), whether it is repeated, without excuse or explanation, and whether it is ongoing.<sup>10</sup> Any remedial steps will be relevant together with a defendant's track record. Proportionality, the respective circumstances of the employer and employee, and deterrence may all be considered.

[16] I am entitled to assume that both defendants are aware of the fact the plaintiff has been required to go to considerable lengths to enforce the orders made by the Authority. Even after the application for sanctions was filed in late 2021, no steps were taken by either defendant to address the problem. The period of time over which the defaults have continued, and the absence of any proper explanation as to why this has been allowed to occur, suggests that the defaults are deliberate and wilful.

[17] As regards the track record of the defendants, I have no evidence one way or the other, and place that factor to one side.

[18] I note there is no evidence of any attempts at remediation and assume that none has occurred.

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<sup>9</sup> *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)* [2016] NZCA 464, [2017] 2 NZLR 451, [2016] ERNZ 828 at [75].

<sup>10</sup> At [76].

[19] Turning to financial circumstances, in the absence of any evidence from the defendants, I assume each are able to pay a fine.

[20] As regards the circumstances of the employee, it is clear from Mr Singh's affidavit that he has been significantly affected by the failure to pay monies which were due to him for wages, compensation, and costs. In default of payment of the sums due to him, he has been placed in a situation where he has been unable to proceed with plans that were important to him and has had to borrow monies which might otherwise have been avoided. He has also incurred the further costs of enforcement.

[21] Turning to deterrence, it is appropriate to impose a sanction on both defendants to deter them from any future breaches; but general deterrence is also important to underline the fact that compliance orders must be obeyed.

[22] In all these circumstances, I conclude that the appropriate sanction is a fine.

[23] Turning to the quantum of a fine, I have reviewed a substantial number of cases, both those referred to by the Court of Appeal in *Peter Reynolds*, and in the judgments of this Court, which were summarised by Judge Smith in *Cooper v Phoenix Publishing Ltd*.<sup>11</sup> I have also reviewed a number of subsequent cases.<sup>12</sup>

[24] In *Cooper*, Judge Smith concluded that the range of cases to which he referred suggests that where an employer in breach has taken no steps to address the default, and there is no issue about capacity to pay, or history of previous breaches, fines start at approximately \$10,000. The fines which have resulted in a lower figure are few, and have involved attempted remediation by a defendant, or at least reasonable efforts to do so.<sup>13</sup>

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<sup>11</sup> *Cooper v Phoenix Publishing Ltd* [2020] NZEmpC 111, [2020] ERNZ 332 at [27]–[35].

<sup>12</sup> *Gates v DC Cladding and Re-Clad Solutions Ltd* [2020] NZEmpC 176; *McKay v Wanaka Pharmacy Ltd* [2021] NZEmpC 79, [2021] ERNZ 304; and *Cousens v Star Nelson Holdings Ltd* [2022] NZEmpC 30.

<sup>13</sup> *Cooper v Phoenix Publishing Ltd*, above n 11, at [34]. See also, *McKay v Wanaka Pharmacy Ltd*, above n 12, at [35].

[25] In *McKay v Wanaka Pharmacy Ltd*,<sup>14</sup> the Court referred to the starting point of \$10,000, as described in *Cooper*, but because a procedural step had been taken, namely, the filing of an application for stay, the amount was reduced to \$8,000 in total.<sup>15</sup> The amount was apportioned between two companies taking into account their financial situations, with the total amount to be paid to the plaintiff.<sup>16</sup>

[26] In *Cousens v Star Nelson Holdings Ltd*, a fine of \$10,000 was imposed in total, with \$6,000 to be paid to the plaintiff, and \$4,000 to be paid to the Crown.<sup>17</sup>

[27] In *Gates v DC Cladding and Re-Clad Solutions Ltd*, a fine of \$10,000 was ordered, with \$7,500 being paid to the plaintiff, and \$2,500 to the Crown.<sup>18</sup>

[28] Standing back, I am satisfied that each defendant should be fined. Although VEL's liability is greater than that of Mr Dhaliwal, it is clear from the determination of the Authority that as director of VEL, he was the effective decisionmaker. It can be presumed in the absence of any contrary evidence that he still is. It is therefore appropriate to treat each defendant equally. A proportionate fine in each instance will total \$5,000. The total of the two sanctions will be \$10,000.

[29] Section 140(7) of the Act allows me to order that part of the fine to be paid to Mr Singh. He sought such an order. He has borne the burden of having to make this application and the pressure associated with the defendants' failures to pay. I consider it would be just to order that a portion of the amount be paid to him to go some way to offset the difficulties he has faced.

[30] I order that each of Mr Dhaliwal and VEL pay the sum of \$5,000, of which \$3,000 in each instance is to be paid to the plaintiff and \$2,000 in each instance is to be paid to the Crown. These sums are to be paid within 28 days. This liability is in addition to the sums which each defendant has already been ordered to pay; those sums should also be paid within 28 days.

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<sup>14</sup> *McKay v Wanaka Pharmacy Ltd*, above n 12, at [35] and [36]–[38].

<sup>15</sup> *Cooper v Phoenix Publishing Ltd*, above n 11.

<sup>16</sup> At [41].

<sup>17</sup> *Cousens v Star Nelson Holdings Ltd*, above n 12, at [31]–[33].

<sup>18</sup> *Gates v DC Cladding and Re-Clad Solutions Ltd*, above n 12, at [30].

## **Outcome**

[31] Mr Dhaliwal is ordered to pay a fine of \$5,000; of that sum \$3,000 is to be paid to Mr Singh and \$2,000 is to be paid to the Crown.

[32] VEL is ordered to pay a fine of \$5,000; of that sum \$3,000 is to be paid to Mr Singh and \$2,000 is to be paid to the Crown.

[33] The defendants should view these orders seriously and discharge their obligations in full and without delay. Failure to do so may well result in a further application for sanctions, in whatever form is necessary.

## **Costs**

[34] Mr Singh is entitled to costs. Mr Dhaliwal and VEL are jointly and severally liable for these in the sum of \$1,000, which should be paid within 28 days.

B A Corkill  
Judge

Judgment signed at 11.00 am on 2 August 2022