IN THE EMPLOYMENT COURT OF NEW ZEALAND
CHRISTCHURCH

I TE KŌTI TAKE MAHI O AOTEAROA
ŌTAUTAHI

[2023] NZEmpC 183
EMPC 209/2021

IN THE MATTER OF	an application for a compliance order
BETWEEN	AAINA JINDAL Plaintiff
AND	RKM SMITH ENTERPRISES LIMITED First Defendant
AND	KISHORKUMAR PATEL Second Defendant

Hearing:	17 October 2023 (Heard at Christchurch via Audio Visual Link)
Appearances:	P Mathews, advocate for plaintiff No appearance for defendants
Judgment:	30 October 2023

JUDGMENT OF JUDGE K G SMITH

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[1] On 22 June 2020, Aaina Jindal entered into a settlement agreement with her former employer RKM Smith Enterprises Ltd to resolve an employment relationship problem. The agreement was signed by a mediator pursuant to s 149 of the Employment Relations Act 2000 (the Act).

[2] The relevant terms of that settlement agreement required RKM to pay or provide to Ms Jindal within 14 days:

(a) outstanding wages owed to her of $661.50 gross;

(b) outstanding holiday pay owed of $1,242 gross;

(c) a compensatory sum pursuant to s 123(1)(c)(i) of the Act of $3,000; and

(d) a written certificate of service which included the dates of her service, the position held, and a general description of the duties performed.

[3] The settlement agreement was not complied with. Ms Jindal applied to the Employment Relations Authority for a compliance order in which she sought to compel compliance with the settlement agreement, the imposition of a penalty and claimed costs.[1]

[4] The Authority was satisfied that RKM had not honoured the terms of the settlement agreement.[2] It made some but not all of the compliance orders requested. The company was ordered to pay what was described in the determination as a "modest deterrent penalty" of $1,000. Of that penalty $500 was directed to be paid to Ms Jindal.[3] The Authority also ordered RKM to pay to Ms Jindal costs of $1,125 and to reimburse her for the lodgement fee of $71.56.[4]

[5] A technical issue identified with the compliance order required Ms Jindal to apply for a re-hearing. That application was successful.[5] The Authority modified the orders it issued in 2021 to impose on RKM a time limit to provide the certificate of service within 14 days of the date of the determination; that is, no later than 18 July 2023. The compliance order was made pursuant to s 137 of the Act.

[6] In her evidence Ms Jindal explained that the company has, over time, paid her the outstanding wages and holiday pay which were referred to in the first determination of March 2021. What has not been paid is the amount of the penalty and costs awarded. However, what prompted the current application to the Court was the company's failure or refusal to provide a certificate of service.

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1 *Jindal v RKM Smith Enterprises Ltd* [2021] NZERA 81 (Member Beck).
2 At [8].
3 At [18].
4 At [21]–[22].
5 *Jindal v RKM Smith Enterprises Ltd* [2023] NZERA 353 (Member Beck).

[7] Ms Jindal's application was made pursuant to s 138(6) of the Act. The section provides that where an Authority order under s 137 has not been complied with, the adversely affected person may apply to the Court for orders under s 140(6).

[8] Section 140(6) 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:
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> (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:
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> (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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> (c) order that the person in default be sentenced to imprisonment for a term not exceeding 3 months:
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> (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.

[9] Mr Mathews, who appeared for Ms Jindal, concentrated his submissions on having RKM fined pursuant to s 140(6)(d).[6] He drew attention to the assessment factors referred to by the Court of Appeal in *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)*: the nature of the default (whether it is deliberate or wilful), whether it is repeated, without excuse or explanation, and whether it is ongoing.[7] Account also has to be taken of any remedial steps taken, the defendant's track record, proportionality, the circumstances of the parties, and any need for deterrence.[8]

[10] Taking each of those factors in turn Mr Mathews submitted that:

(a) the company's failure to comply with a settlement agreement and subsequent compliance order by providing the certificate of service was deliberate, wilful and ongoing;

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6 He accepted that the Authority had not made a compliance order against the second defendant and that consequently no orders under s 140(6) could be made in relation to him.

7 *Peter Reynolds Mechanical Ltd v Denyer (Labour Inspector)* [2016] NZCA 464, [2017] 2 NZLR 451.

8 At [77].

(b) there is an element of contemptuous disregard for the Authority's determinations in the company's action. It was on notice both through the settlement agreement and the subsequent steps taken in the Authority that the settlement agreement needed to be satisfied;

(c) there has been no remediation;

(d) the circumstances of RKM are not known to Ms Jindal, but there is no reason to assume that it is beyond the abilities of the defendant company to provide the certificate; and

(e) there has been a significant impact on Ms Jindal not only because she is out of pocket for having to apply to the Authority and now the Court, but also because the absence of a certificate has caused difficulties for her in seeking employment.

[11] Bearing those matters in mind, it was submitted that deterrence was required. Mr Mathews noted the range of fines in other cases such as *Nathan v Broadspectrum (New Zealand) Ltd*, *Myatt v Pacific Appliances Ltd* and *Cooper v Phoenix Publishing Ltd*, but he accepted that this case was not consistent with them.[9] In a pragmatic way he submitted that a fine of $5,000 ought to be imposed. A request was made for $3,000 of that fine to be directed to be paid to Ms Jindal.

[12] I agree with Mr Mathews' submissions about the relevant assessment factors. It is reasonable to conclude the default is deliberate because RKM signed the settlement agreement and must, therefore, have been aware of the commitment that was made. Notwithstanding that commitment, it has failed to perform the innocuous step of completing the certificate. Completing it must be a reasonably straight forward task as the certificate would only record the fact of Ms Jindal's employment and the nature of it as referred to in the settlement agreement,

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9 *Nathan v Broadspectrum (New Zealand) Ltd (formerly Transfield Services (New Zealand) Ltd)* [2017] NZEmpC 90; *Myatt v Pacific Appliances Ltd* [2016] NZEmpC 24; and *Cooper v Phoenix Publishing Ltd* [2020] NZEmpC 111, [2020] ERNZ 332.

[13] In the absence of an explanation, I infer that the failure or refusal to write that certificate of service is deliberate and wilful. It also follows that there has been no remediation despite the lengthy steps Ms Jindal has taken to obtain the benefit of the settlement agreement.

[14] I agree that it is relevant to take into account both deterrence and RKM's financial circumstances. I assume that RKM is able to pay a fine. Deterrence is relevant not only to ensure this defendant does not fail to meet the terms of a settlement agreement, but to send a message that such agreements and Authority orders must be complied with.

[15] That leaves for assessment the level of the fine. The cases Mr Mathews referred to provide little assistance, since they were concerned with breaches that are different in quality and nature from the breach here. The Court was invited to impose a fine of $5,000, which is 12.5 per cent of the maximum possible. In the circumstances I accept that the fine proposed is an appropriate one. Of that amount it is reasonable to award $3,000 to Ms Jindal.

[16] Ms Jindal is entitled to an order for costs. The submission was that the company ought to be ordered to pay $3,000, which Mr Mathews advised me was less than Ms Jindal's actual costs and the amount that might be calculated as payable if the Court applied Category 1, Band A, from its Guideline Scale.[10] A costs award of $3,000 is appropriate.

Outcome

[17] Pursuant to s 140(6) of the Act, RKM Smith Enterprises Ltd is fined $5,000.

[18] Of the fine referred to in paragraph [17], $3,000 is payable to Ms Jindal and the balance to the Crown.

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[10] "Employment Court of New Zealand Practice Directions" <www.employmentcourt.govt.nz> at No 18.

[19] The company is to pay costs to Ms Jindal of $3,000.

K G Smith
Judge

Judgment signed at 9.25 am on 30 October 2023